Supreme Court U.S.
FILED
01 351 AUG 27 2001
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No.

In The Supreme Court of the United States

SHERYL KNIGHT AND STEVE KNIGHT, PETITIONERS
v.
WILLIAM C. BUCKNAM, M.D.

On Petition For Writ of Certiorari
To The Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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134 pp

QUESTIONS PRESENTED FOR REVIEW

Petitioners Sheryl and Steve Knight alleged that defendant William C. Bucknam, M.D. was negligent when he let a patient under his direct care, co-defendant Karl Mueller, drive to the hospital for treatment of a psychiatric emergency, resulting in an automobile crash that left Sheryl Knight disabled. Pursuant to Dr. Bucknam's summary judgment motion, the Washtenaw County Circuit Court ruled that the legislative enactment and judicial enforcement of Michigan's statutory physician-patient privilege, MCL § 600.2157, unconstitutionally deprived Dr. Bucknam of his Due Process rights. The Circuit Court stated that petitioners had presented evidence of Dr. Bucknam's negligence but dismissed the Knights claims because Mr. Mueller's assertion of the statutory privilege precluded Dr. Bucknam from raising an issue of material fact to dispute his negligence. The Michigan Court of Appeals let the Due Process ruling stand without substantive discussion and additionally concluded that petitioners had failed to present sufficient evidence of Dr. Bucknam's negligence. In doing this, the Michigan Court of Appeals applied its own findings of fact to a standard of proof different than the standard imposed by the Circuit Court and by weighing testimonial evidence, without remanding the case for determination of the relevant facts. Thus, the questions presented here for review are:

1. Whether the legislative enactment and judicial enforcement of Michigan's statutory physician-patient privilege, MCL § 600.2157, deprived Dr. Bucknam of his Due Process rights in a manner that justified dismissal of petitioners' claims in this case.

II

2. Whether the Michigan Court of Appeals deprived petitioners of their constitutional rights to due process of law and a jury trial when the court justified a grant of summary judgment by applying its own findings of fact to a standard of proof different than the standard imposed by the Washtenaw County Circuit Court and by weighing testimonial evidence, without remanding the case for factual determination.

III

PARTIES TO PROCEEDINGS

Sheryl Knight and Steve Knight originally filed this action against Karl Otto Mueller in the Washtenaw County Circuit Court, State of Michigan. The Knights subsequently added William C. Bucknam, M.D. as a defendant. The claims against Mr. Mueller were resolved in Washtenaw County Circuit Court Proceedings, and Mr. Mueller was dismissed from the action. The appeal has addressed the Knights' claims against Dr. Bucknam.

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PETITION FOR WRIT OF CERTIORARI

Sheryl Knight and Steve Knight hereby petition for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Michigan Court of Appeals is not reported. The order of the Michigan Court of Appeals denying rehearing is not reported. The order of the Michigan Supreme Court denying the application for leave to appeal is reported at 463 Mich. 972, 623 N.W.2d 596 (2001). The order of the Michigan Supreme Court denying the motion for reconsideration has not been reported. The

opinions and orders of the Washtenaw County Circuit Court are not reported.

JURISDICTION

The decision of the Michigan Court of Appeals was entered on April 28, 2000. A motion for rehearing was denied by the Michigan Court of Appeals on July 21, 2000. The application for leave to appeal to the Michigan Supreme Court was denied on February 26, 2001. *Knight v Mueller*, 463 Mich. 972, 623 N.W.2d 596 (2001). A motion for reconsideration was denied on May 29, 2001. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Michigan Compiled Laws § 600.2157 provides:

Sec. 2157. Physician-patient privilege; waiver. Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition. If a patient has died, the heirs at law of the patient, whether

proponents or contestants of the patient's will, shall be considered to be personal representatives of the deceased patient for the purpose of waiving the privilege under this section in a contest upon the question of admitting the patient's will to probate. If a patient has died, the beneficiary of a life insurance policy insuring the life of the patient, or the patient's heirs at law, may waive the privilege under this section for the purpose of providing the necessary documentation to a life insurer in examining a claim for benefits.

***

Article I, Section 14 of the Michigan Constitution, provides:

Sec. 14. Jury trials. The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree.

***

Article I, Section 17 of the Michigan Constitution, provides:

Sec. 17. Self-incrimination; due process of law; fair treatment at investigations. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

***

The Fifth Amendment of the Constitution states in relevant part that "No person shall be deprived of life, liberty or property without due process of law."

***

The Seventh Amendment of the Constitution states that: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

***

The Fourteenth Amendment to the Constitution states in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case tests both the constitutionality of a statutory physician-patient privilege and the constitutionality of a court's power to render summary judgment by determining facts.

1. This case arises from an automobile crash that occurred on October 3, 1995. Dr. William C. Bucknam knew a great deal about Karl Mueller's psychiatric condition before that date because Dr. Bucknam had been providing psychiatric treatment to Mr. Mueller for the previous eight years. App. I, *infra*, 30a. Dr. Bucknam reports that Mr. Mueller had a 25-year history with a psychiatric diagnosis of a manic form of

bipolar affective disorder. App. I, *infra*, 29a. To treat this condition, Dr. Bucknam gave Mr. Mueller prescriptions for Tegretol (800 mg/d), Depakote (500 mg/d), and lithium carbonate (600 mg/d). App. I, *infra*, 30a. Despite this medication, Dr. Bucknam states that this disorder manifests itself in Mr. Mueller with manic episodes occurring every two years on average, and these episodes are so severe that they require hospitalization for one-to-two weeks. App. I, *infra*, 30a. Dr. Bucknam notes that these episodes are known to afflict Mr. Mueller with psychiatric delusions, along with poor judgment and bizarre behavior. *Ibid.*

Dr. Bucknam has testified that he relies on a psychiatric reference work entitled Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) in making his diagnosis of this type of psychiatric disorder. App. L, *infra*, 48a. That text indicates that the following criterion is required for the diagnosis of manic episode: "The mood disturbance is sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others, or to necessitate hospitalization to prevent harm to self or others, or there are psychotic features." App. M, *infra*, 52a. Poor judgment leading to "reckless driving" is also identified by the DSM-IV as a common feature of the manic episode. App. M, *infra*, 50a.

When Mr. Mueller began feeling the symptoms of manic episode on October 3, 1995, he came to Dr. Bucknam's office. App. J, *infra*, 38a. Mr. Mueller's manic episodes apparently are such that Mr. Mueller does not know it when he is having one. App. J, *infra*, 38a. Mr. Mueller was questioning whether or not he was having a manic episode, so he came to Dr. Bucknam's office and "let him make that decision."

App. J, *infra*, 38a. The decision was made to take Mr. Mueller to St. Joseph Mercy Hospital, a few miles from Dr. Bucknam's office, to be admitted through the emergency room. App. J, *infra*, 38a; App. K, *infra*, 42a-44a. Dr. Bucknam then permitted Mr. Mueller drive his own vehicle in this condition, following Dr. Bucknam to the emergency room as he drove his own vehicle. *Ibid.*

They almost made it. Dr. Bucknam reports that he was able to see Mr. Mueller following him as they proceeded out of the parking lot of Dr. Bucknam's office, down Plymouth Road, then Dixboro Road, and then Huron River Drive. App. K, *infra*, 43a. Dr. Bucknam has testified that the tandem bypassed the general entrance to the hospital, instead proceeding to the emergency entrance. App. K, *infra*, 44a. When he entered the hospital emergency room parking lot, Dr. Bucknam lost track of his patient. App. K, *infra*, 44a. Dr. Bucknam says he waited in the emergency room area for about 20 minutes before realizing that Mr. Mueller was no longer with him, and he then headed back in the direction of his office. *Ibid.* That is when Dr. Bucknam came upon "Karl Mueller's vehicle in the lane of oncoming traffic, where the head-on collision had just occurred." App. K, *infra*, 41a.

Dr. Bucknam originally claimed that he was a "Good Samaritan" stopping to assist at the scene of the accident. App. K, *infra*, 40a. However, Dr. Bucknam also says that he did not approach the driver of the other vehicle involved in the crash, Sheryl Knight, and he did not attempt to make any observations regarding whether Ms. Knight was injured. App. K, *infra*, 42a.

Dr. Bucknam has testified that he told the police officer that Mr. Mueller was having a manic episode. App. K, *infra*, 45a. Dr. Bucknam then drove Mr. Mueller back to the

hospital in Dr. Bucknam's vehicle. App. K, *infra*, 45a. Dr. Bucknam reports that Mr. Mueller was kept in the hospital for this manic episode condition for the next two weeks, from October 3, 1995 to October 16, 1995. App. I, *infra*, 30a.

These facts are all taken from the admissions of Dr. Bucknam in a Psychological Evaluation report he prepared regarding Mr. Mueller's condition shortly after the crash (App. I, *infra*, 27a-32a) and from the deposition testimony of Dr. Bucknam (App. K, *infra*, 39a-45a; App. L, *infra*, 46a-48a) and Mr. Mueller (App. J, *infra*, 33a-38a).

2. The Knights originally filed suit against Mr. Mueller in Washtenaw County Circuit Court, and during the early stages of discovery, Mr. Mueller provided the interrogatory answers attached as Appendix H. In response to a question asking whether he was suffering from any type of medical condition at the time of the accident, Mr. Mueller responded that he is a manic depressive and identified Dr. Bucknam as his treating physician. App. H, *infra*, 25a. Mr. Mueller also noted that he was taking Tegretol by prescription, and he listed Dr. Bucknam as a person who would have relevant information regarding the facts of the case. *Ibid.* After a request for the driving record of Mr. Mueller, the Michigan Department of State provided a copy of the Psychological Evaluation report prepared by Dr. Bucknam to assist Mr. Mueller in restoring his driving privileges. App. I, *infra*, 27a-32a. The deposition of Dr. Bucknam was then taken. App. K, *infra*, 39a-45a. When the extent of Dr. Bucknam's involvement in the events leading up to the crash was ascertained, the Knights added Dr. Bucknam as a defendant. The Knights basically claimed that Dr. Bucknam undertook an unreasonable risk of harm toward third-party drivers such as Ms. Knight when Dr. Bucknam permitted Mr.

Mueller to drive while knowing that Mr. Mueller needed emergency psychiatric hospitalization for his manic disorder, and this type of negligence claim is recognized in Michigan where it was "foreseeable that the actor's conduct might create a risk of harm to the victim." *Duvall v. Goldin*, 139 Mich. App. 342, 352, 362 N.W.2d 275 (1984).

During these proceedings, the Knights filed a motion to deem Mr. Mueller's physician-patient privilege waived in the action, based on the voluntary disclosures already made in answers to interrogatories, depositions, and the Psychological Evaluation report submitted by Dr. Bucknam regarding Mr. Mueller's driving privileges. See Apps. H – K, *infra*, 25a-45a. Under the Michigan Court Rules, MCR 2.314(B)(1), a privilege must be timely asserted in order to avoid waiver, and the Knights argued that Mr. Mueller's failure to assert the privilege before providing medical information in interrogatory answers constituted a waiver of the privilege. Both Mr. Mueller and Dr. Bucknam opposed this motion. The court denied the Knights' motion, ruling that "Plaintiffs may not compel the disclosure of any further information regarding the medical treatment" of Mr. Mueller by Dr. Bucknam. App. C, *infra*, 17a-18a. However, the court also ordered that all of the previously disclosed information contained in the interrogatory answers, depositions, and Psychological Evaluation prepared by Dr. Bucknam was *not* covered by the privilege. *Ibid.*

The Knights asserted that the factual admissions contained in the disclosed records were sufficient for a jury to find Dr. Bucknam liable in negligence under *Duvall*, but also obtained an affidavit opinion from a board-certified psychiatrist, Dr. Gerald Shiener. App. N, *infra*, 54-55a. Dr. Shiener expressly based his opinions on the factual

admissions contained in the previously disclosed report of Dr. Bucknam and the depositions of Dr. Bucknam and Mr. Mueller. App. N, *infra*; 53a-54a; see Apps. I, J, and K, *infra*, 27a-45a. Dr. Shiener stated: "It is my opinion that Dr. Bucknam was negligent in not arranging transportation for this patient, but rather allowing the patient to drive to the hospital in his own vehicle, and this negligence resulted in the accident in which Sheryl Knight was injured." App. N, *infra*, 55. The Knights submitted this affidavit in addition to the previously disclosed deposition testimony and Psychological Evaluation of Dr. Bucknam to oppose the motion.

Before the close of discovery, Dr. Bucknam moved for summary disposition under the M.C.R. 2.116 of the Michigan Court Rules, which provides the same relief as Rule 56 of the Federal Rules of Civil Procedure. The text of Dr. Bucknam's motion is attached at Appendix P, infra, 65a-70a. Dr. Bucknam argued that the court's order denying the Knights' motion to find a waiver of the physician-patient privilege had effectively denied Dr. Bucknam his constitutional Due Process rights under the Fourteenth Amendment and under Article II, Section 16 of the Michigan Constitution. (App. P, *infra*; 70a note: Michigan's due process clause is now embodied in Article I, Section 17 of the Michigan Constitution.) Dr. Bucknam claimed he had a liability defense that he could not disclose or present because of the restrictions of the privilege: "it is those same records and testimonial evidence about his patient-physician relationship with Mr. Mueller which forms the basis for Dr. Bucknam's defense." App. P, *infra*, 67a. Dr. Bucknam also contended that, whenever the physician-patient privilege

was upheld, it necessarily operated as a "shield" against the physician's liability. App. P, *infra*, 69a-70a.

In a derivative argument, Dr. Bucknam asserted that it would be impossible for an expert psychiatrist to develop an adequate factual foundation to support opinion testimony regarding Dr. Bucknam's negligence without full access to his privileged records and thoughts. App. P, *infra*, 68a-69a. Dr. Bucknam sought to support this allegation with an affidavit from Dr. Dan Guyer, but when Dr. Guyer was not made available for deposition, the court struck him as an expert. App. D, *infra*, 20a. Dr. Bucknam submitted no other affidavits or documents in support of his motion. In addition to a brief addressing the constitutional arguments of Dr. Bucknam, the Knights submitted Dr. Shiener's affidavit, the previously disclosed deposition testimony of Dr. Bucknam and Mr. Mueller, and the Psychological Evaluation written by Dr. Bucknam to oppose the motion.

The Opinion and Order of the Washtenaw County Circuit Court, Hon. Melinda Morris, is attached as Appendix B, *infra*,9a-16a. The court first looked at the expert qualification issue raised by Dr. Bucknam, recognizing that this is a matter committed to trial court discretion, but found that the issue was not ripe for review. App. B, *infra*, 12a, citing, *Mulholland v DEC International, Inc*, 432 Mich. 395 (1989)..

The court then decided the case on constitutional grounds, finding that Dr. Bucknam's Due Process rights had been deprived, and that: "Since the heart of the physician's defense is contained in the patient records, the court is compelled to grant defendant Bucknam summary disposition of dismissal of plaintiff's negligence/malpractice claim against him." App. B, *infra*, 14a-16a. In addressing the issue of whether Mr. Mueller's assertion of the privilege

constituted a state action sufficient to invoke Due Process rights, the court stated:

> In accordance with *Shelley v. Kramer*, [334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948)], the court finds that the action of a state court and its judiciary in upholding the privilege is a state action within the meaning of the fourteenth amendment. *The protection of the fourteenth amendment against infringement by a state extends to judicial as well as legislative action. Shelley*, [92 L.Ed.] at 1169. Further, the physician/patient privilege, as embodied in M.C.L 600.2157, is a state action, sufficient to give rise to Dr. Bucknam's due process rights.

App. B, *infra*, 14a.

The court also recognized that prevailing case law governing this cause of action required plaintiff to prove the following elements:

- "the doctor/patient relationship between Bucknam and Mueller
- that Bucknam had special knowledge of Mueller's condition
- and that it was reasonably foreseeable that Mueller could harm other highway travelers if permitted to drive"

App. B, *infra*, 14a-15a.

The court noted that the Knights had raised evidence of Dr. Bucknam's negligence, but found that this was insufficient "in the face of the privilege which has precluded defendant Bucknam from raising an issue of material fact." App. B, *infra*, 16a. Therefore, because the legislative enactment and judicial enforcement of the statutory physician-patient privilege were viewed as depriving Dr. Bucknam of his Due Process rights to present privileged evidence in his defense, the Knights claims were dismissed.

3. The Knights' challenged this constitutional interpretation on several grounds in their appeal as of right to the Michigan Court of Appeals. First, the Knights argued that the remedy of dismissal of the Knights' claims was wrong, even if Dr. Bucknam's constitutional Due Process rights had been deprived. (Appellants' Brief, at 32.) The Knights noted that, even in criminal cases where the constitutional rights at issue include the Sixth Amendment as well as the Fourteenth Amendment, and even where prosecutorial suppression of evidence gives rise to a clear finding of state action, the remedy is still cautious disclosure and not dismissal. *Ibid;* citing *People v. Stanaway*, 446 Mich. 643, 677, 521 N.W.2d 557 (1994). Because the *Stanaway* procedures are designed to strike "the delicate balance between the defendant's federal and state constitutional rights to discover exculpatory evidence shielded by privilege, and the Legislature's interest in protecting the confidentiality of the therapeutic setting," the Knights argues that the *Stanaway* procedures would provide the appropriate remedy in civil cases as well. Ibid; citing *Stanaway*, 446 Mich. at 678-79. Along these lines, the Knights noted that they were being deprived of their Due Process

rights to a greater extent than Dr. Bucknam under the trial court's ruling:

> If this is the law pertaining to the assertion of the physician-patient privilege in a civil action, then the Knights should be able to overcome the privilege in this case. After all, it is the Knights who challenged the privilege without success, and it is the Knights who are being deprived of their right to a trial as a result of the Trial Court's ruling. If anyone should be able to overcome the privilege asserted by Mr. Mueller on grounds of Due Process deprivation, it is the Knights who have that legitimate claim.
>
> *Ibid; see, Kelly v. Ford Motor Co.*, 280 Mich. 378, 386, 273 N.W. 737 (1937) ("A law which would practically shut out the evidence of a party, and thus deny him the opportunity for a trial, would substantially deprive him of due process of law.")

The Knights also challenged the "state action" finding in light of cases following *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974), and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982). *Ibid*, at 36-38. Next, the Knights argued that Dr. Bucknam had waived his right to a remedy for the constitutional deprivation because Dr. Bucknam knowingly supported the action that allegedly took his Due Process rights. *See, D.H. Overmyer Co., Inc. v. Frick*, 405 U.S. 174, 185-86 (1972). *Ibid*, at 39-40. Finally, the Knights continued their argument that the privilege had been waived by Mr. Mueller sufficiently to permit Dr. Bucknam to use his records, which

would render the constitutional issues moot. *Ibid*, at 41-44. Dr. Bucknam did not file a cross-appeal.

The Michigan Court of Appeals opinion is attached as Appendix A, *infra*, 1a-8a. The Court of Appeals concluded that Mr. Mueller's voluntary responses to discovery requests did not effect a waiver of the physician-patient privilege. App. A, *infra*, 3a-5a. The Court of Appeals then let the constitutional interpretation of the trial court stand without substantive discussion, instead stating: "Even if we were to assume that the trial court erred in granting summary disposition based on Bucknam's due process claim as plaintiffs contend, we conclude that summary disposition was proper under Bucknam's alternative theory – that plaintiffs failed to present sufficient evidence to create a material factual dispute regarding his negligence." App. A, *infra*, 5a-6a. The appellate court then applied a different standard than was first applied by the trial court, now requiring proof that: "(1) the existence of a physician-patient relationship between the physician and the patient who was the cause-in-fact of the plaintiff's injuries (2) breach of the applicable standard of care required by the physician in the treatment of the patient and (3) that the negligent treatment of the patient was the proximate cause of the plaintiff's injuries." App. A, *infra*, 6a. The appellate court then reviewed some of the facts that had been presented in the case, and concluded: "Plaintiffs produced no evidence regarding the type of care Bucknam provided to Mueller the day of the accident or that Bucknam knew at the time he met with Mueller that he was unfit to drive." *Ibid*. The appellate court also found that the affidavit of Dr. Gerald Shiener was "speculative at best," based on the assertion that Dr. Shiener did not perform an independent medical examination of Mr.

Mueller and the evidence upon which he relied did not provide specific information regarding Bucknam's treatment of Mueller." App. A, *infra*, 7a. On this basis, the Michigan Court of Appeals affirmed the dismissal of the Knights claims against Dr. Bucknam. *Ibid.*

The Knights' motion for rehearing argued at length that the appellate court's determination of the facts and weighing the evidence invaded the realm of the jury, thereby depriving the Knights of their constitutional rights to a jury trial under Article 1, Section 14 of the Michigan Constitution and the Seventh Amendment. (Motion for Rehearing, pp. 6-7 and n. 22.) The Knights argued that the appellate court was actually reversing the trial court's finding that there was some evidence of negligence, as well as the decisions regarding review of expert opinion and the standard of proof, without remand and really without any appeal having been filed by Dr. Bucknam. (Motion for Rehearing, pp.9-10.) Among other things, the Knights contended that these rulings deprived the Knights of due process under Article 1, Section 17 of the Michigan Constitution, and under the Fifth Amendment and Fourteenth Amendment. (Motion for Rehearing, p. 10 and n. 30.)

The Michigan Court of Appeals denied the Knights' motion for rehearing without further comment. App. E, *infra*, 22a. The Knights restated each of these constitutional arguments in their application for leave to appeal filed with the Michigan Supreme Court (Application for Leave, pp. 33-65), and when that application for leave was denied, App. F., *infra*, 23a, the Knights again restated their constitutional arguments in a motion for reconsideration. (Motion for Reconsideration, pp. 8-10.) The Michigan Supreme Court

denied the Knights' motion for reconsideration without further comment on May 29, 2001. App. G, *infra*, 24a.

ARGUMENT FOR GRANTING THE WRIT

The constitutionality of a state's statutory physician-patient privilege appears to be a matter of first impression for this Court. Any constitutional limitations would be of significant and widespread interest because the physician-patient privilege is frequently invoked. Similarly, summary judgment is a common judicial tool, and although the procedural requirements have been established by court rules, the constitutional underpinnings of those requirements are less clear. Consequently, it is important for citizens to know the extent to which their constitutional rights limit a court's power to grant summary judgment by finding facts. To answer these fundamental questions, the writ should be granted.

1. If the psychotherapist-patient privilege of *Jaffee v. Redmond*, 518 U.S. 1 (1996), prevented the psychotherapist from raising an otherwise valid defense to a civil action claim for damages, would the psychotherapist be able to overcome the privilege? What is the appropriate remedy for such a situation? These questions are central to this case. In *Jaffee*, this Court held that, "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of Federal Rules of Evidence." *Jaffee* at 15. The Court there observed that such a privilege "promotes sufficiently important interests to outweigh the need for probative evidence...." *Jaffee* at 9-10, *quoting Trammel v. United States*, 445 U.S. 40, 51 (1980). In this case, the trial court has held that the need for probative

evidence to present an unarticulated liability defense not only outweighs the interests protected by the privilege, but also carries the protection of the Due Process Clause of the Fourteenth Amendment. (App. B, *infra*.) The cases are clearly at odds, and some resolution seems warranted.

Like *Jaffee*, many privileges protect only against *compelled* disclosures of confidential information. *See*, *Jaffee* at 15. The privilege can be waived, *Jaffee* at 15 n. 14, and information that is voluntarily disclosed is obviously not confidential and, therefore, not privileged. The intent of the *Jaffee* privilege is to protect confidential communications so that the therapist can help her patients. *Jaffee* at 10-11. In this case, however, the principal thrust of the privilege appears to be immunization of a psychiatrist from seemingly obvious liability. Indeed, Dr. Bucknam's original motion for summary disposition asserts that the privilege is a "shield" to the physician's liability, and that summary disposition must be granted in any case where the privilege is upheld no matter what other facts are in evidence. App. P, *infra*, 69a-70a.

Because of the voluntarily disclosed information available in this case, we know a great deal about what happened on October 3, 1995. We know that Mr. Mueller came to the office of his psychiatrist in an increasingly manic state warranting transport to the emergency room of a hospital for immediate treatment. App J, *infra*, 37a-38a; App. K, *infra*, 43a-44a. We know that Mr. Mueller was being taken to the emergency room for treatment of a manic episode condition that is characterized by psychiatric delusions, bizarre behavior, and poor judgment. App. I, *infra*, 29a-31a We know that Dr. Bucknam felt the need to accompany his patient to the hospital, and we know that Dr. Bucknam

decided to bypass the general entrance to the hospital in hopes of reaching the emergency room entrance. App. K, *infra*, 44a. We also know that Dr. Bucknam let his patient drive under these circumstances. App. K, *infra*, 42a-43a. We cannot fathom why.

Still, Dr. Bucknam claims that he has a secret defense, apparently a justification defense, and he cannot even tell us what it is because Mr. Mueller has asserted the physician-patient privilege and enshrouded the records and thoughts of Dr. Bucknam from disclosure. Dr. Bucknam agrees that the privilege should be applied to hide the records, and at the same time he claims that the application of the privilege has taken his Due Process rights to present evidence in his defense. As Dr. Bucknam puts it:

> 12. While Defendant Dr. Bucknam believes the Court correctly recognized Defendant Mueller's right to exercise his patient-physician privilege and thus restrict from evidence Mr. Mueller's medical records and testimony regarding same, in so doing, it presents a situation in which Dr. Bucknam is unable to receive a fair trial because it is those same records and testimonial evidence about his patient-physician relationship with Mr. Mueller which forms the basis for Dr. Bucknam's defense.
>
> App. P, *infra*, 67a.

This remains all we know about Dr. Bucknam's defense. We would like to know more, and the Knights have done all they can to make Dr. Bucknam's records available to him. However, we continue to question whether the legislative

enactment and judicial enforcement of Michigan's statutory physician-patient privilege, M.C.L § 600.2157, can be construed as a deprivation of Dr. Bucknam's Due Process rights in a manner that justified dismissal of petitioners' claims in this case. We question whether the private assertion of a privilege that is permissively protected by statute can amount to a "state action" in accordance with cases such as *Lugar v. Edmondson Oil*, 457 U.S. 922, 936-37 (1982), which requires that a Due Process deprivation be fairly attributable to a state actor. Mr. Mueller had the exclusive right to assert or waive his privilege, and the fact that the privilege was enacted and protected by the state does not convert Mr. Mueller into a state actor. As noted in *Lugar*, "Without a limit such as this, private parties could face constitutional challenges whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Id.*, *see also*, *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) (applying the same principal in the context of a § 1983 claim).

We also question whether Dr. Bucknam has preserved any right he has to a Due Process remedy in this case, given that Dr. Bucknam supported the enforcement of the privilege that allegedly caused the deprivation rather than challenging that enforcement. There is no question that Dr. Bucknam knew that the privilege would preclude his use of his medical records, or that Dr. Bucknam chose to support application of the privilege. Consequently, it appears that Dr. Bucknam may have waived his rights to a remedy for any alleged deprivation. *D.H. Overmyer v. Frick*, 405 U.S. 174, 185-86 (1972).

Finally, to the extent that Dr. Bucknam's constitutional Due Process rights are jeopardized by the privilege, the

appropriate remedy is cautious disclosure, not dismissal of the Knights' claims. The Knights did not take Dr. Bucknam's constitutional rights. In fact, the Knights tried to open the records for all to use in this case. This is the type of procedure available in Michigan criminal cases, where the Sixth Amendment right of confrontation is implicated in addition to any Fourteenth Amendment right, and the prosecutor's suppression of privileged evidence constitutes state action:

> [O]ur review of the jurisprudence of other states, along with our own precedent in dealing with discovery and evidentiary principles, coupled with a prudent need to resolve doubts in favor of constitutionality, prompts us to hold that in an appropriate case there should be available an *in camera* inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.
>
> *People v. Stanaway*, 446 Mich. 643, 676-77, 521 N.W.2d 557 (1994).

The *Stanaway* procedures would afford access to confidential records in appropriate cases, perhaps under a protective order. *Id.* at 678-79. These procedures provide a reasonable remedy, and thus, there is no basis for dismissing the Knights' claims as a result of Dr. Bucknam's alleged Due Process deprivation.

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2. The Michigan Court of Appeals, though not the trial court, offered a second justification for granting summary judgment based on its findings regarding the facts in this case. The Knights contend that the Michigan Court of Appeals violated their rights to due process and a jury trial in this manner. Like the provisions contained in the Fifth, Fourteenth, and Seventh Amendments, the Michigan Constitution guarantees citizens their rights to due process and a jury trial. Michigan Constitution, Article I, Section 17 and Article I, Section 14. Also like the summary judgment rule under Rule 56 of the Federal Rules of Civil Procedure, Michigan allows for summary judgment in appropriate cases under M.C.R. 2.116 (termed "summary disposition" under the Michigan Court Rules). Rule 56(c) states in part that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

M.C.R. 2.116 provides for summary judgment where, among other things:

> (C)(10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

The rules are virtually identical, and like the federal rule, the basic principles guiding the administration of the Michigan rule have been well developed in case law:

> The standard for deciding a motion under M.C.R 2.116(C)(10) is well established. The court must first review all the evidence presented, including any depositions, affidavits, admissions, and pleadings, and then ascertain whether there is any dispute as to a material fact. *Omega Construction Co. v. Altman*, 147 Mich. App. 649 (1985). The test is whether the record which might be developed, giving the benefit of any reasonable doubt to the non-moving party, would leave open an issue upon which reasonable minds differ. *Rizzo v. Kretschmer*, 389 Mich. 363 (1973). The court should be liberal in finding a question of material fact. *Livonia v. Department of Social Services*, 84 Mich. App. 724 (1978). Even if the underlying evidentiary facts are not in dispute, when the inferences that can be drawn from them are such that reasonable people can differ, an issue of fact exists. *Bardoni v. Kim*, 151 Mich. App. 169 (1986).
>
> App. B, infra, 13a – 14a.

These principles appear identical in substance to the federal cases articulating the basis for granting summary judgment. See, *Kodak v. Image Technical Svcs.*, 504 U.S. 451, 456 (1992); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Arizona v. Maricopa County Medical*

Society, 457 U.S. 332, 229 (1982). Like Michigan law, for example, these cases incorporate the principle that "[t]he evidence of [petitioners] is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson*, at 255. We contend that these principles are not mere jurisprudential developments, but rather, they are requirements necessary to preserve the constitutionally protected rights of citizens to due process and a jury trial. So when *Anderson* recited the principle that "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial," *Id.* at 249, this should be seen as an important protection of constitutional rights.

The trial court in this case noted that the Knights had presented "some evidence of defendant's negligence," and that Dr. Bucknam could not counter it because the privilege "precluded defendant Bucknam from raising an issue of material fact." App. B, *infra*, 16a. On review, the Michigan Court of Appeals essentially reversed course: "Even if we were to assume that the trial court erred in granting summary disposition based on Bucknam's due process claim as plaintiffs contend, we conclude that summary disposition was proper under Bucknam's alternative theory – that plaintiffs failed to present sufficient evidence to create a material factual dispute regarding his negligence." App. A, *infra*, 6a. The only factual issue actually presented by Dr. Bucknam's motion related to the foundational requirements for expert testimony, claiming that access to the privileged records of Dr. Bucknam was necessary for any expert to render an opinion in the case, and this became the focus of the appellate inquiry as well. App. P, *infra*, 67a-70a; App. A, *infra*, 6a-7a. The result is a myriad of shifting standards and

factual determinations by the appellate court, resulting in the loss of the Knights' rights to due process and a jury trial.

The expert qualification issue was addressed, but not decided, by the trial court because Dr. Bucknam had not presented anything for the court to review. App. B, *infra*, 12a. The court first correctly noted that the issue of expert qualification is committed to the discretion of the trial court. *Ibid*, citing *Mulholland v. D.E.C. International, Inc.*, 432 Mich. 395 (1989). The court then noted that defendant had not presented anything for the court to review in relation to the issue, and therefore, determined that the argument was premature. *Ibid*. This decision was not cross-appealed by Dr. Bucknam, and if it were appealed, "[a]ppellate courts will interfere with a trial court's ruling in this regard only to correct an abuse of discretion." *Mulholland* at 402, citing *People v Gambrell*, 429 Mich. 401, 407; 415 N.W.2d 202 (1987). Nevertheless, the Michigan Court of Appeals reviewed this matter *de novo*, changing the standard of proof, and then determining that the expert's opinion was "speculation at best" because the factual evidence upon which he relied "did not provide specific information regarding Bucknam's treatment of Mueller." App.A, infra, 6a-7a. This issue should not have been reviewed, and if anything, it should have been remanded. Even assuming *de novo* review was somehow appropriate, the facts should be viewed in the light most favorable to the Knights. *Livonia*, supra; *Bardoni*, supra.

It is important to realize that the facts discussed by the appellate court here are actually the factual admissions contained in the depositions of Dr. Bucknam and Mr. Mueller, and in Dr. Bucknam's own Psychological Evaluation report. See, Apps. I-L, *infra*, 27a-48a. Dr.

Shiener's opinion was based expressly on the admissions of fact contained in these documents. App. N, *infra*, 54a-55a. The appellate court is nevertheless *weighing* this testimony to determine whether it is renders the expert testimony credible. Astonishingly, the appellate court is deciding that Dr. Bucknam's own Psychological Evaluation report regarding Mr. Mueller does not provide a reliable basis for determining that Dr. Bucknam knew the facts recited in that report. We are being asked to conclude that the admitted facts contained in Dr. Bucknam's deposition testimony are merely speculative. The Knights contend that they are protected from this type of judicial conclusion by virtue of their rights to a jury trial under Article I, Section 14 of the Michigan Constitution (in effect, identical to the rights provided under the Seventh Amendment), and by the due process provisions of Article I, Section 17 of the Michigan Constitution, the Fifth Amendment, and the Fourteenth Amendment.

After all, we *know* that Mr. Mueller submitted himself to the care of Dr. Bucknam due to concerns about the onset of a manic episode. App. J, *infra*, 37a-38a. We *know* that Dr. Bucknam was fully aware of Mr. Mueller's history, including the psychiatric delusions, bizarre behavior, and poor judgment. App. I, *infra*, 29a-31a. We *know* that Dr. Bucknam decided the symptoms were serious enough to warrant admission to the emergency room for psychiatric hospitalization. App. K, *infra*, 43a-44a. We *know* that Dr. Bucknam said Mr. Mueller had been having a manic episode. App. K, *infra*, 45a. These admitted facts are certainly sufficient to support the conclusion of an expert, or the inference by a jury, that "Dr. Bucknam was negligent in not arranging transportation for this patient, but rather

allowing the patient to drive to the hospital in his own vehicle." App. N, *infra*, 55a. Indeed, the underlying *Duvall* case specifically contemplates this type of breach:

> Here, one of the alleged breaches of duty involves the defendant's failure to inform his patient not to operate a motor vehicle. The likelihood of injury to a third party due to an automobile accident arising from that breach is not so rare or unusual an occurrence as to be considered unforeseeable.

Duvall, 139 Mich. App. at 352.

In arriving at its conclusion in this case, the Michigan Court of Appeals also shifted the standard of proof that the Knights would need to meet to survive summary judgment. The trial court stated that the burden required the Knights to prove that it was reasonably foreseeable that Mueller could harm other highway travelers if permitted to drive. App. B, *infra*, 15a. The Michigan Court of Appeals recited a different standard, requiring proof of breach of the applicable standard of care required by the physician in the treatment of the patient." App. A, *infra*, 6a. Both of these standards are objective standards of care, but like a moving target, the appellate court then examined the facts in terms of a subjective standard, concluding that the Knights had not proven that "Dr. Bucknam knew at the time he met with Mueller that he was unfit to drive." App. A, *infra*, 7a. Even this standard, more akin to intentional torts or gross negligence, is met by the facts of this case. Dr. Bucknam knew Mr. Mueller was susceptible to delusions, among other things, and knew that he needed to get Mr. Mueller to the

emergency room for treatment of the condition that produces those delusions. Finally, the appellate court suggests that Dr. Shiener's opinion, based directly on the admissions of fact by Dr. Bucknam, lacks a proper foundation because Dr. Shiener "did not independently examine Mueller." App. A, *infra*, 7a. It is unclear how the appellate court would expect an examination of Mr. Mueller to alter the factual admissions of Dr. Bucknam or give us more information about what Dr. Bucknam knew at the time of the accident. Moreover, the appellate court's analysis clearly would place Mr. Mueller's medical condition "in controversy," but the appellate court found that Mr. Mueller had not waived his privilege precisely because his condition was not "in controversy." App. A, *infra*, 5a.

Like federal law, Michigan law holds that "[I]t is for [the jury], and not for the court to compare and weigh the evidence ." *Jim-Bob, Inc. v. Mehling*, 178 Mich. App. 71, 85-86, 443 N.W.2d 451, 457-58 (1989). We contend that this is as much a constitutional right as matter of jurisprudence. In this case, the Michigan Court of Appeals has reached out to find the facts, going so far as to negate factual admissions and to compare and weigh the evidence against a shifting set of standards, without remanding the case for proper factual determination. In doing so, the Michigan Court of Appeals has deprived petitioners of their constitutional rights to due process of law and a jury trial. If anyone is going to decide that Dr. Bucknam was not negligent under the admitted facts of this case, it justly ought to be a jury.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 23, 2001

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs-Appellants,

V

KARL OTTO MUELLER,

Defendant,

and

WILLIAM C. BUCKNAM, M.D.,

Defendant-Appellee.

UNPUBLISHED
April 28, 2000

No. 212478
Washtenaw Circuit Court
LC No. 96-002725-NI

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting of summary disposition in favor of defendant William C. Bucknam, M.D. pursuant to MCR 2.116(C)(10). We affirm.

This appeal arises out of an automobile accident that occurred in Ypsilanti on October 3, 1995. Karl Mueller was traveling on Dixboro Road when his vehicle crossed the center lane and collided with a vehicle driven by plaintiff Sheryl Knight, which was traveling in the opposite direction. When the police arrived at the scene ten to fifteen minutes later, Mueller told them that "he could not explain why he was on the wrong side of the road" and that he was "having a manic episode."[1]

Defendant Bucknam had treated Mueller for his psychiatric disorder for over eight years and, on the day of the accident, the two had met at Bucknam's office. Bucknam

then drove to the hospital, with Mueller following in his own car. When Bucknam arrived at the hospital, he noticed that Mueller had not followed him into the parking lot, so he retraced the route and eventually arrived at the accident scene. After speaking with Mueller at the scene, Bucknam told a police officer that Mueller was "having a manic episode." About a month after the accident, Bucknam completed a psychiatric evaluation at Mueller's request and submitted it to the Secretary of State for the purpose of restoring his driving privileges.

Plaintiffs initially sued only Mueller, alleging that he was negligent in failing to yield the right of way to southbound traffic. During discovery, Mueller did not assert his psychiatric condition as a defense to the accident and admitted negligence. Both Mueller and Bucknam were subsequently deposed for the purpose of establishing plaintiffs' damages. At the depositions, Mueller's counsel objected to questions concerning his medical condition or treatment based on the physician-patient privilege either at the outset or in response to specific inquires, and confirmed that Mueller would not waive the privilege. Plaintiffs then amended the complaint to add Bucknam as a defendant, alleging that his special relationship with Mueller gave rise to a duty to protect third persons who might be foreseeably injured by Mueller's unsafe driving and that he breached that duty.[2] In response to the allegations against Bucknam, Mueller asserted the physician-patient privilege as a bar to any inquiry concerning his psychiatric condition or treatment.

Plaintiffs subsequently filed a motion to deem the physician-patient privilege waived on grounds that Mueller had voluntarily disclosed information concerning his condition and treatment during discovery. The trial court denied the motion, ruling that any information regarding Bucknam's treatment of Mueller that Mueller had already disclosed (i.e., answers to interrogatories and deposition questions, and documents submitted to the Secretary of

State) remained unprivileged, but that plaintiffs could not "compel the disclosure of further information." Bucknam moved for summary disposition, arguing that the trial court's decision to uphold the privilege, although proper, would result in a denial of due process because it would prevent him from introducing evidence necessary to defend against plaintiffs' claims, and alternatively, that plaintiffs could not establish a prima facie case of negligence without such evidence. Plaintiffs filed a response and moved for partial summary disposition under MCR 2.116(I)(2), contending that Bucknam's admissions in his deposition and other evidence established his liability as a matter of law. The trial court granted summary disposition for Bucknam based on the due process theory, and expressly declined to review plaintiff's motion for summary disposition.[1]

On appeal, plaintiffs argue that the trial court abused its discretion in concluding that Mueller did not waive the physician-patient privilege with respect to medical information not disclosed during discovery. We disagree. This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion. *Dorris v Detroit Osteopathic Hospital Corp*, 220 Mich App 248, 250; 559 NW2d 76 (1996).

The physician-patient privilege prohibits a physician from disclosing information acquired when attending a patient in a professional character if the information was necessary to enable the physician to prescribe for the patient as a physician. MCL 600.2157; MSA 27A.2157; Dorris v Detroit Osteopathic Hospital Corp, 460 Mich 26, 33 ; 594 NW2d 455 (1999). The purpose of the privilege is to protect the confidential nature of the physician-patient relationship and to encourage a patient to make full disclosure of symptoms and conditions. *Id.* In addition to the statutory privilege, the court rules contain several provisions regarding the discovery of medical information. MCR 2.314(A)(1)(b) provides in part that, "[w]hen a mental or physical condition of a party *is in controversy*, medical

information is subject to discovery under these to the extent that ... the party does not assert that the information is subject to a valid privilege." (Emphasis added). See also *Domako v Rowe*, 438 Mich 347, 354; 475 NW2d 30 (1991).

The privilege belongs to the patient and, once asserted, can be waived only by the patient. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 276; 568 NW2d 411 (1997). A true waiver is an intentional, voluntary act, which has been defined as the "voluntary relinquishment of a known right." *Kelly v Allegan Circuit Judge*, 382 Mich 425, 427; 169 NW2d 916 (1969); *Dorris, supra* at 39. MCR 2.314(B)(1) also permits an implied waiver when the patient fails to timely assert the privilege in the party's written response to a request for production of documents, in answers to interrogatories, before or during the taking of a deposition, or by moving for a protective order. See also *Landelius v Sackellares*, 453 Mich 470, 475; 566 NW2d 472 (1996); *Domako, supra* at 354-355.

Plaintiffs' contention that Mueller waived the privilege when he voluntarily disclosed information regarding his medical condition and treatment on three occasions during discovery lacks merit. Plaintiffs first refer to medical information contained in the psychological evaluation Bucknam submitted to the State for the purpose of restoring Mueller's driving privileges. However, we find no waiver where, as here, the disclosure was made before the suit against Mueller had been filed, Mueller only authorized the release of information to the State for a specific purpose, and plaintiffs subpoenaed the report from the State. See also *Kelly, supra* (a physician's letter to the defendant insurance company describing the medical condition of the insured did not effect a waiver of the physician-patient privilege). Nor can we conclude that Mueller's responses to interrogatories constituted an intentional relinquishment of the privilege. The answers merely provided basic information regarding his present condition, treating physician's name, and mediation; they

did not include specific details regarding either his treatment or his condition on the day of the accident. Further, because Mueller's condition was not "in controversy" at the time he responded to the interrogatories, the implied waiver provisions contained within MCR 2.314(B)(1) did not apply. Cf. *Domako, supra*; see also *LeGendre v Monroe County*, 234 Mich App 708; 600 NW2d 78 (1999).

Plaintiffs also assert that Mueller waived the privilege by discussing the psychological condition and treatment during his deposition. In the portion of the deposition to which plaintiffs refer, Mueller testified that he had Bucknam complete the evaluation to the State and confirmed that the statements therein were accurate; that on the day of the accident he questioned whether he was entering into a manic episode and saw Bucknam to allow him to make the determination; and, that he thought the accident occurred just before or at the beginning of a manic episode. Again, we cannot conclude that this testimony expressly or impliedly waived the privilege where Mueller did not provide specific information regarding his treatment on the day of the accident, his counsel announced at the outset that Mueller would not waive the privilege, and his counsel objected to inquiry regarding medical information which had not been previously disclosed.[4] Accordingly, the trial court correctly determined that the privilege had not been waived.

Next, plaintiffs argue that the trial court erred in granting Bucknam's motion for summary disposition. We disagree. This Court reviews a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(10), the court considers the documentary evidence in the light most favorable to the unmoving party. *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate where there is no genuine issue of material

fact and the moving party is entitled to judgment as a matter of law. *Id.* At 454-455, quoting *Quinto supra* at 362.

Even if we were to assume that the trial court erred in granting summary disposition based on Bucknam's due process claim as plaintiffs contend, we conclude that summary disposition was proper under Bucknam's alternative theory – that plaintiffs failed to present sufficient evidence to create a material factual dispute regarding his negligence. See *Phinney v Perlmutter*, 22 Mich App 513, 532; 564 NW2d 532 (1997) (reversal is not required where the trial court reaches the right result for the wrong reason). In order to establish a claim of negligence against a defendant physician for injuries caused by the patient to a third-party, the plaintiff must show (1) the existence of a physician-patient relationship between the physician and the patient who was the cause in-fact of the plaintiff's injuries (2) breach of the applicable standard of care required by the physician in the treatment of the patient and (3) that the negligent treatment of the patient was the proximate cause of the plaintiff's injuries. *Welke v Kuzilla*, 144 Mich App 245, 252-253; 375 NW2d 403 (1985); *Duvall v Goldin*, 139 Mich App 342, 350-352; 362 NW2d 275 (1984).

Here, plaintiffs submitted documentary and testimonial evidence establishing: that Bucknam had treated Mueller for several years and knew that he had a history of manic episodes that were characterized by "impaired judgment, delusion, bizarre behavior"; that Bucknam knew that the episodes occurred every two years and required hospitalization for one to two weeks, and that Mueller was asymptomatic between episodes; that Mueller submitted himself to Bucknam's care on the day of the accident because he was not sure whether he was experiencing the onset of a manic episode; that after meeting with Bucknam, the two drove to the hospital in separate vehicles; that the accident occurred while on route to the hospital; and that after Bucknam arrived at the scene of the accident and spoke with Mueller, he told the police that Mueller was having a manic

episode.[5] While this evidence shows the existence of a patient-physician relationship, plaintiffs failed to present evidence establishing that Bucknam breached the standard of care. Plaintiffs produced no evidence regarding the type of care Bucknam provided to Mueller the day of the accident or that Bucknam knew at the time he met with Mueller that he was unfit to drive. Although plaintiffs offered an affidavit from an expert's psychiatrist in which he opined that Bucknam was negligent in allowing Mueller to drive to the hospital in his own vehicle, his conclusion was speculation at best. Plaintiff's expert did not independently examine Mueller and the evidence upon which he relied did not provide specific information regarding Bucknam's treatment of Mueller. See *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485-486; 502 NW2d 742 (1993) (a party opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of proving evidentiary proof establishing a genuine issue of material fact); see also *Garabedeian v Wm Beaumont Hospital*, 208 Mich App 473, 475-476; 528 NW2d 809 (1996). Accordingly, we conclude that the trial court's grant of summary disposition was proper.

Given our disposition of this issue, we need not reach plaintiffs' claim that summary disposition should have been granted in their favor.

Affirmed.

s/ Harold Hood

s/ Michael R. Smolenski

s/ Michael J. Talbot

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[1] At deposition, Mueller testified that did not recall making the statement to the police and that he believed the accident occurred just before or during the beginning stages of the manic episode.

[2] Specifically, plaintiffs alleged that Bucknam was negligent in failing to diagnose and recognize the severity of Mueller's condition; failing to recognize that the condition prevented Mueller from driving safely; failing to take measures to prevent injury to persons who might be injured by Mueller's unsafe driving; failing to use alternative means of transportation; failing to inform Mueller that he should not drive a vehicle while he was experiencing the condition; and, permitting Mueller to drive while he was under care for an emergency psychotic condition.

[3] Mueller settled with plaintiffs and is not a party to this appeal.

[4] The authority upon which plaintiffs rely for the proposition that prior disclosures waive the privilege are distinguishable. In those cases, privilege was deemed waived where, unlike the present case, the individuals sought to assert the privilege after they had expressly authorized the release of medical records to opposing parties. *Landelius, supra; Domako, supra.*

[5] Plaintiffs also rely on an excerpt from a medical textbook, which states that "reckless driving" is a common feature of manic episodes. Although Bucknam testified at deposition that he relied on the textbook in diagnosing and treating the condition, there is no indication that the excerpt was submitted to the trial court and therefore may not be considered on appeal. MCR 7.210(A); *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998).

APPENDIX B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASTENAW

SHERYL KNIGHT and STEVE KNIGHT,
Plaintiff,

v

Case No. 96-2725-NI
Honorable Melinda Morris

KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
Jointly and Severally,
Defendant.

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OPINION AND ORDER GRANTING DEFENDANT BUCKNAM'S

MOTION FOR SUMMARY DISPOSITION

At a Session of the Court held in the
Washtenaw County Courthouse in
the City of Ann Arbor on
February 12, 1998

PRESENT: HONORABLE MELINDA MORRIS, Circuit Judge

The matter before the court arises from a plaintiff's automobile negligence action filed against the driver of the other automobile involved in the collision and his psychiatrist. The allegation against Dr. Bucknam, who had treated defendant Mueller on the day of the accident, is that he was negligent in that he *knew or should have known that Mr. Mueller was suffering from a serious psychiatric disorder...and would pose an increased risk of injury to other persons if he were permitted to drive.*

The Court has previously denied plaintiff's motion to deem the physician patient privilege waived insofar as it pertains to information and documents not previously disclosed.

Defendant Bucknam now brings a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant argues that considering the court's previous rulings that plaintiff can bring a third party claim grounded in negligence against defendant Bucknam based on his relationship with defendant Mueller, and that defendant Mueller may assert his patient-physician privilege as it pertains to his medical records and treatment with Dr. Bucknam (which is not disputed), defendant Bucknam is placed in a position where he cannot present pertinent evidence on his own behalf, which results in a violation of his due process rights. *Kelly v. Ford Motor Company,* 280 Mich 378 (1937).

Further, without any evidence of Mr. Mueller's treatment with Dr. Bucknam, any testimony presented by

Plaintiffs' expert witnesses would be pure speculation. Where plaintiff's case is solely based on speculation, summary disposition or directed verdict is proper. *Garabedian v. William Beaumont Hospital*, 208 Mich App 473, *lv den* 450 Mich 985 (1996).

Defendant argues the plaintiff must prove a breach of the applicable standard of care by Dr. Bucknam in the treatment of Mr. Mueller. *Welke v. Kuzilla*, 144 Mich App 245 (1985). Without the requisite foundation and knowledge contained in the treatment records, no witness can offer a credible opinion as to the propriety of Dr. Bucknam's actions in allowing Mr. Mueller to drive.

Finally, defendant argues that no Michigan court in a similar situation has both upheld the patient-physician privilege and denied the physician summary disposition.

In *Landelius v Rafko*, 453 Mich 470 (1996), the Michigan Supreme Court recognized that it should either uphold the patient-physician relationship and thus affirm the granting of defendant's motion for summary disposition, as the plaintiff could not establish a *prima facie* case without such records, or find the patient-physician privilege had been waived thus allowing access to the medical records at issue.

In *Landelius* the Supreme Court reversed the finding that the defendant doctor was entitled to summary disposition, but it did so only on the basis that the privilege had been waived.

Thus defendant concludes that because the privilege is intact, Dr. Bucknam is unable to defend and plaintiff is unable to show a breach of the standard of care. Summary disposition as to Dr. Bucknam is required.

Plaintiff responds that there must be a finding of *state action* before a claimed due process violation may be redressed. see *Shavers v. Kelly* 402 Mich 554 (1978). In order to raise a due process argument, there must be a sufficiently

close nexus between the state and the challenged action so that the acts may be fairly treated as those of the state itself. *People v. Farrow*, 183 Mich App 436, (1990). Where there is an insufficient allegation of state action, a due process argument necessarily fails. *Ferrell v. Vic Tanny International, Inc.*, 137 Mich App 238, (1984).

Even if his due process argument is accepted, Dr. Bucknam's acquiescence in defendant Mueller's assertion of privilege would constitute a waiver of defendant Bucknam's due process rights. See, *D.H. Overmyer Co. v. Frick*, 405 U.S. 174, 185-86, 31 L.Ed. 124, 92 S.Ct. 775 (1972).

As to the expert qualification issue, trial courts have great discretion regarding the admissibility of expert testimony. *Mulholland v. DEC International, Inc.* 432 Mich. 395 (1989).

To exercise that discretion the court must review the testimony offered by the proposed expert. As defendant has presented no testimony, there is nothing for the court to review. This aspect of defendant's argument s premature.

Further, plaintiff argues it is she who is entitled to partial summary disposition with regard to the liability of Dr. Bucknam. The applicable case law is recited in *Duvall v. Goldin* 139 Mich App 342 (1984) and followed in *Landelius v. Sackellares*, 453 Mich 470 (1996). In the instant case, the nexus between defendant Bucknam's negligence and defendant Mueller's driving is even closer. Further, Dr. Bucknam provided a physician's statement for defendant Mueller to obtain a reinstatement of his driving privileges subsequent to the accident. Dr. Bucknam's diagnosis was a psychiatric illness identified as bipolar affective disorder, manic, in remission. Further, he stated:

> *Approximately 25 year. Hx. of above diagnosis, manifested by manic episodes with frequency of every 2 years, on average.* ***During a manic episode he has impaired judgment, delusions and bizarre behavior.***

> ***Episodes require hospitalization for 1-2 weeks.*** (Emphasis added).

Dr. Bucknam has also testified that at the accident scene he told the police officer that Mr. Mueller was having a manic episode. Clearly, plaintiff argues, defendant Bucknam nevertheless allowed defendant Mueller to drive, foreseeably endangering other drivers such as plaintiff, Sheryl Knight. This is exactly the type of liability contemplated in *Duvall*, supra, and plaintiffs ask the Court to render partial judgment as a matter of law pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2), establishing defendant Bucknam's liability for the car crash which injured plaintiff.

Defendant's reply asserts that the patient-physician privilege is a *state action* having been created by the legislature and embodied as statutory law. Further, this Court is a *state actor* and its rulings are *state actions*. *Shelley v. Kramer*, 334 US 1, 92 L Ed 1161, 68 S Ct 836 (1948). *Shelley* states in pertinent part:

> *The courts may not be used to destroy rights which are protected against infringement or deprivation by the constitutional guarantees of due process and equal protection of the laws. Moreover, the protection of the Fourteenth Amendment against infringement by a state extends to judicial as well as legislative action.*

The standard for deciding a motion under MCR 2.116(C)(10) is well established. The court must first review all the evidence presented, including any depositions, affidavits, admissions, and pleadings, and then ascertain whether there is any dispute as to a material fact. *Omega Construction Co. v. Altman*, 147 Mich App 649 (1985). The test is whether the record which might be developed, giving the benefit of any reasonable doubt to the non-moving party,

would leave open an issue upon which reasonable minds differ. *Rizzo v. Kretschmer*, 389 Mich 363, (1973). The court should be liberal in finding a question of material fact, *Livonia v. Department of Social Services*, 84 Mich App 724 (1978). Even if the underlying evidentiary facts are not in dispute, when the inferences that can be drawn from them are such that reasonable people can differ, an issue of fact exists. *Bardoni v. Kim*, 151 Mich App 169 (1986).

In accordance with *Shelley v. Kramer*, supra, the court finds that the action of a state court and its judiciary in upholding the privilege is a state action within the meaning of the fourteenth amendment. *The protection of the fourteenth amendment against infringement by a state extends to judicial as well as legislative action, Shelley*, at 1169. Further, the physician/patient privilege, as embodied in MCL 600.2157, is a state action, sufficient to give rise to Dr. Bucknam's due process rights.

Bucknam has not waived his due process right by acquiescing to the privilege. The privilege belongs to the patient, Mr. Mueller. The privilege was created by the legislature. Whether or not Dr. Bucknam agrees with and supports Mr. Mueller's right to the privilege is immaterial to his own due process rights.

The more important issue is whether Dr. Bucknam's due process rights are violated because he is unable to testify to his treatment of defendant Mueller in the face of the physician/patient privilege.

In *Duvall v. Goldin*, supra, the Court of Appeals addressed the same question as in the instant case, i.e. is a physician liable to third persons injured as a result of a physician's negligence in treating a patient who, as a result of his medical condition, causes an automobile accident involving third persons? On the narrow facts of that case where the privilege was not asserted, the court found liability. See also, *Landelius v. Sackellares*, 453 Mich 470 (1996) where the court found the privilege had been waived.

There is no question that liability to third parties may be established under a theory of medical malpractice, *Welke v. Kuzella* (citation omitted), or ordinary negligence *Duvall v. Goldin*, supra.

- Plaintiff must prove:
    - the doctor/patient relationship between Bucknam and Mueller
    - that Bucknam had special knowledge of Mueller's condition
    - and that it was reasonably foreseeable that Mueller could harm other highway travelers if permitted to drive

Since Mueller has asserted the privilege (paragraph 17 of Mueller's answer to 2nd amended complaint), the court is required to exclude any evidence of Bucknam's treatment of Mueller. The court stated in *Kelly v. Ford Motor Company* that:

> *A law which would practically shut out the evidence of a party and denies opportunity for (defense), would substantially deprive him of due process.*

Plaintiff argues that Mueller waived his privilege when he allowed Dr. Bucknam to submit a physician's statement on his application to the Secretary of State for restoration of his driving privileges. The court disagrees. Once timely asserted, the privilege is only waived expressly or by estoppel when a patient seeks to shield information from the same person as to whom it was earlier disclosed. *Landelius*, supra. A Secretary of State application is not such a disclosure.

The overriding rationale of the physician/patient privilege is to encourage patients to freely divulge

symptoms and conditions without fear that the information will be disclosed and embarrass or damage the patient.

In conclusion, it is clear that Mueller timely asserted his privilege, never waived it, and there being no evidence of collusion between the doctor and patient, the court must uphold the privilege. Since the heart of the physician's defense is contained in the patient records, the court is compelled to grant defendant Bucknam summary disposition of dismissal of plaintiff's negligence/malpractice claim against him.

IT IS THEREFORE ORDERED that defendant Bucknam's motion for summary disposition is **granted**. In so doing, the court has not addressed plaintiff's motion for partial summary disposition. Even though some evidence of defendant's negligence appears on the record, such evidence is insufficient to allow summary disposition particularly in the face of the privilege which has precluded defendant Bucknam from raising an issue of material fact.

SUMMARY DISPOSITION IS GRANTED.

s/Melinda Morris
Honorable Melinda Morris
Circuit Judge

APPENDIX C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASTENAW

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs,

Case No. 96-2725-NI

v

HON. MELINDA MORRIS

KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
jointly and severally,

Defendants.

_____/

CHARLES N. SIMKINS (P24990)
ROBERT B. JUNE (P 51149)
SIMKINS & SIMKINS, P.C.
Attorneys for Plaintiffs
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Northville, Michigan 48167-1416
(810) 349-6030

DENNIS M. KILLEEN (P29773)
BECKER, LANCTOT, McCUTCHEON,
SCHOOLMASTER, TAYLOR & HOM
Attorneys for Defendant, Karl Otto Mueller
1700 First Federal Building
Detroit, Michigan 48226
(313) 237-5658

JOHN PATRICK O'LEARY (P18464)
KEVIN P. HANBURY (P39468)
O'LEARY, O'LEARY, JACOBS, MATTSON,
PERRY & MASON
Attorneys for Defendant, William C. Bucknam, M.D.
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076-4165

(810) 948-1000

_____/

ORDER DENYING PLAINTIFF'S MOTION TO DEEM PHYSICIAN PATIENT PRIVILEGE WAIVED

At a session of said Court, in the city of Ann Arbor, County of Washtenaw, State of Michigan on April 28, 1997.

PRESENT HON: _____
Circuit Court Judge

The Court having reviewed the submissions and arguments of the parties, and otherwise being fully advised in the premises;

IT IS HEREBY ORDERED THAT this Plaintiffs' Motion to Deem Physician Patient Waived is hereby denied, and Plaintiffs may not compel the disclosure of any further information regarding the medical treatment of Defendant, Karl Otto Mueller, by Defendant, William C. Bucknam, M.D. This Order does not apply to information that has already been disclosed and remains unprivileged, including documents submitted to the Michigan Department of State, answers to interrogatories, and answers to deposition questions.

s/MELINDA MORRIS
Hon. Circuit Court Judge

This Order was prepared by Plaintiff's Counsel.

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASTENAW

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs,

Case No. 96-2725-NI

v

HON. MELINDA MORRIS

KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
jointly and severally,

Defendants.

CHARLES N. SIMKINS (P 24990)
ROBERT B. JUNE (P 51149)
SIMKINS & SIMKINS, P.C.
Attorneys for Plaintiffs
200 N. Center Street
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1700 First Federal Building
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(313) 237-5658

JOHN PATRICK O'LEARY (P 18464)
KEVIN P. HANBURY (P 39468)
O'LEARY, O'LEARY, JACOBS, MATTSON,
PERRY & MASON
Attorneys for Defendant, William C. Bucknam, M.D.
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076-4165

(248) 799-8260

ORDER GRANTING DEPOSITION OF DEFENDANT, WILLIAM C. BUCKNAM, M.D., AND STRIKING DAN GUYER, M.D., AS AN EXPERT WITNESS

At a session of said Court, in the city of Ann Arbor, County of Washtenaw, State of Michigan on Oct 24 1997.

Present: Melinda Morris
Hon. Circuit Court Judge

This matter having come on for hearing before this Court on October 15, 1997, the Court having reviewed the written submissions and arguments, and otherwise being fully advised in the premises;

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion to Compel the Deposition of Defendant, William C. Bucknam, M.D., is granted with the understanding that:

   A. Plaintiffs shall not ask Defendant, William C. Bucknam, M.D. any of the questions that were asked at his deposition on January 20, 1997; and

   B. This Court's Order Denying Plaintiffs' Motion to Deem Physician-Patient Privilege Waived, entered on April 28, 1997, shall be enforced and honored by all counsel during the deposition of Defendant, William C. Bucknam, M.D.

2. The Court hereby strikes Dan Guyer, M.D., as an expert witness in this case, and Dr. Guyer shall not testify at trial of this action.

3. In the event that the physician-patient privilege is waived or this Honorable Court's ruling regarding same is reversed, thus making Mr. Mueller's medical records

available and testimony regarding the nature of his psychiatric relationship with Dr. Bucknam available, Defendant may petition the Court to reinstate Dr. Guyer as an expert witness.

4. The Court reserves any further ruling on the Affidavit of Dan Guyer, M.D. until such time as Defendant Dr. Bucknam's Motion for Summary Disposition is heard.

s/MELINDA MORRIS
Hon. Circuit Court Judge

This Order was prepared by counsel for Plaintiffs, Sheryl Knight and Steve Knight.

s/Robert B. June (P 51149) 10/21/97
Attorneys for Plaintiffs Date

Approved as to form:

s/Jennifer Andreou (P 38973 10/21/97
Attorney for Defendant, Date
William C. Bucknam, M.D.

s/Dennis Killeen (P 29773) 10/23/97
Attorney for Defendant,0 Date
Karl Otto Mueller

APPENDIX E

Court of Appeals, State of Michigan

ORDER

Harold Hood
Presiding Judge

Sheryl Knight v Karl Otto Mueller

Michael R. Smolenski

Docket No. 212478

Michael J. Talbot

LC No. 96-002725 NI

Judges

The Court orders that the motion for rehearing is hereby DENIED.

s/Harold Hood
Presiding Judge

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

July 21, 2000 s/_____
Date Chief Clerk

APPENDIX F

Order
Entered: February 26, 2001

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

117419

SHERYL KNIGHT and STEVE KNIGHT,
Plaintiffs-Appellants,

V

SC: 117419
COA: 212478
KARL OTTO MUELLER, Washtenaw CC: 96-002725-NI
Defendant,

and

WILLIAM C. BUCKNAM, M.D.,

Defendant-Appellee.

On order of the Court, the application for leave to appeal from the April 28, 2000 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

e0220
I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
February 26, 2001 s/Corbin R. Davis Clerk

APPENDIX G

Order
Entered: May 29, 2001

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

117419(52)

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs-Appellants,

V SC: 117419
COA: 212478

KARL OTTO MUELLER, Washtenaw CC: 96-002725-NI

Defendant,

and

WILLIAM C. BUCKNAM, M.D.,

Defendant-Appellee.

On order of the Court, the motion for reconsideration of this Court's order of February 26, 2001, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

b0522
I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 29, 2001 s/Corbin R. Davis Clerk

APPENDIX H

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

SHERYL KNIGHT and STEVE KNIGHT,

C. A. #96-2725-NI

HON.:

Plaintiffs,

v.

KARL OTTO MUELLER,
Defendant.

_____/

BARRY P. WALDMAN P21902
BRIAN A. McKENNA P46671
Attorneys for Plaintiffs
1000 Farmer Street
Detroit, MI 48226
313 965-3464 (fax 965-4315)

_____/

[EXCERPTS FROM]
DEFENDANT'S ANSWERS TO
PLAINTIFFS' INTERROGATORIES TO DEFENDANT,
DATED FEBRUARY 12, 1996

4. At the time of the alleged occurrence, were you suffering from any medical condition, injury, disease, or illness? If so, please list each such condition, injury, disease or illness which defendant was suffering from on the date of the alleged occurrence, and the name and address of the physician(s) treating same.

ANSWER:

I am a manic depressive;
My treating physician: William C. Buckman, M.D.
5340 Plymouth Rd., Suite 207
Ann Arbor, MI 48105

10. Please state whether you took or ingested any drug, narcotic, sedative, tranquilizer or any other form of medication or medical preparation, whether prescribed or not, within the 24 hours immediately preceding the alleged occurrence. If so, please state:

a. Nature of substance taken or ingested;
b. When and where taken or ingested;
c. Whether procured by prescription;
d. Quantities taken or ingested;
e. Time period over which taken or ingested.

ANSWER:

a. One a day vitamin tablet, Synthroid, Tegratol
b. At home and at work
c. Synthroid and Tegratol are prescription medications
d. 9-10 hour time period

13. List the names and addresses of all persons known to you or your representative or attorney, who have any knowledge or claim to have any knowledge or relevant information, facts or circumstances relative to the instant cause of action.

ANSWER:

*** William C. Buckman, M.D., 5340 Plymouth Rd., Ste. 207, Ann Arbor, MI 48105;

***

s/Karl Otto Mueller

APPENDIX I

[EXCERPT]
UNITED STATES OF AMERICA
The State of Michigan
DEPARTMENT OF STATE
TO ALL TO WHOM THESE PRESENTS SHALL COME:

T. Candice S. Miller, Secretary of State of the State of Michigan and Custodian of the Great Seal thereof, Do Hereby Certify that THE ANNEXED COPIES OF DRIVING RECORD, ORDER OF ACTION AND DOCTOR'S STATEMENT IN THE NAME OF KARL OTTO MUELLER, BIRTHDATE 01/03/1941, ARE TRUE COPIES. *END OF CERTIFICATION*

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State in the Capital City of Lansing, this SIXTH day of MARCH A.D. 1997

s/Candice S. Miller
Secretary of State

[new page]

MICHIGAN DEPARTMENT OF STATE
LANSING, MI 48918-1601

PHYSICIAN'S STATEMENT OF EXAMINATION

INSTRUCTIONS FOR DRIVER/APPLICANT:

The Department of State has received information that you may be afflicted with a physical or mental condition that may affect your ability to safely operate a motor vehicle. Please have your physician complete this form. The completed form must be returned to the following address. It cannot be processed at a local licensing bureau.

INKSTER-WAYNE SAFETY CENTER
DRIVER IMPROVEMENT ANALYST
27165 CHERRY HILL ROAD

INKSTER MI 48141-1234

PLEASE NOTE: The Department of State may withhold licensing pending receipt and evaluation of this form. Unsigned or incomplete forms will be returned for completion.

RELEASE OF INFORMATION

Name Driver's License No.

I, (Please Print or type) Karl Otto Mueller M 460 461 668010 hereby authorize and request that information regarding my physical and psychological condition be released to the Michigan Department of State.

s/Karl Mueller	11/9/95
Signature	DATED
13 Byfield	1-3-41
Street	DATE OF BIRTH
Dearborn MI 48120	(313) 663-9011
City State Zip	TELE. NO.

Friday, Nov. 17, 1995 1:00pm

INSTRUCTIONS FOR PHYSICIAN:

The Department of State asks your assistance in determining the physical and/or mental condition of your patient. Your professional opinion, the answers to these questions and any other pertinent information will help the Department assess this individual's ability to safely operate a motor vehicle. Confidential information may be mailed directly to the Department at the address shown in the instructions to Driver above.

Please type or print your answers and attach EG or EKG evaluations if applicable.
You need only fill out the section(s) indicated or pertinent to this person.

(x) Neurological or Neuromuscular Diseases – page 2 ___

(x) Other Medical Disorders – page 3 & 4 _____
(x) Drugs and Alcohol – page 4 _____
(x) Psychological Evaluation – page 5 _____
(x) Comments – page 6 _____

Reason for Request

Certification by physician's signature is required on page 6.

FOR DRIVER IMPROVEMENT USE ONLY
(x) Favorable ( ) set up ___( ) Refer for reexamination
( ) Restriction _____( ) Refer to Health Consultant
_____( ) Need additional information
( ) Must Pass _____test ( ) Medical ( ) Vision
( ) Unfavorable

Reviewed By s/T. Duncan Date 11/17/95

[new page]

[*Italics signify handwritten remarks of Dr. Bucknam]

PSYCHOLOGICAL EVALUATION

1. Diagnosis of psychiatric illness: *Bipolar Affective Disorder, Manic, in remission*

Which of the following symptoms are present? (Please Check) ***NONE NOW***

( ) Anxiety	( ) Paranoid ideation
( ) Hallucinations	( ) Depression
( ) Suicidal Impulses	( ) Impairment of judgment
( ) Euphoria	( ) Homicidal impulses
( ) Poor Memory	( ) Poorly controlled anger
( ) Insomnia	( ) Mental retardation
( ) Bizarre behavior	( ) Delusions
( ) Senility or Dementia	( ) Other _____

Please amplify on any of the above or other disorders. Include approximate duration of illness, severity of illness, treatment and prognosis: *Approximately 25 yr. Hx of above diagnosis, manifested by manic episodes with*

frequency of every 2 years, on average. During a manic episode he has impaired judgement, delusions and bizarre behavior. Episodes require hospitalization for 1–2 weeks.

2. Current medication and dosage: *Tegretol 800 mg/d, Depakote 500 mg/d & lithium carbonate 600 mg/d.*

3. Any adverse or other reactions to medication, treatment or therapy? Please explain: *Hx of neuroleptic malignant syndrome.*

   a. Does medication make patient drowsy? No X Yes _
   b. Is patient capable of safely operating a motor vehicle while taking the above prescribed medication(s)? No _____ Yes X Please explain:

4. Has patient ever been hospitalized for the disorder? No _____ Yes X Please indicate when, where and for how long:: *Approximately every 2 years x 1-2 weeks, usually at St Joseph Mercy Hosp in Ann Arbor and most recently from Oct 3 – Oct 16, 1995*

5. Frequency of therapy: *Outpatient every 6 weeks for medication review only*

6. Do you believe this patient is capable of operating a motor vehicle? No _____ Yes X Please explain: ___

7. Do you recommend any driving restrictions? No X Yes____ Please explain: ____

8. Does the patient follow your medical and psychiatric recommendations? No_____ Yes X Please explain: _____

[new page]

COMMENTS

1. How long has this patient been under your treatment? *Since 1/27/87* Frequency of visits: *every 6 weeks*

2. Was patient referred to you by another doctor? No ____ Yes X If yes, please indicate name and address of

referring doctor: *Former psychiatrist, Dr. Babcock, moved away.*

3. Have you referred the patient to another medical specialist for diagnosis or treatment? No X Yes ____ If yes, please indicate name and address of doctor to whom referred and results of consultation:_____

4. Has patient followed your medical recommendation? No ___ Yes X

   a. Does the patient keep appointments? No__ Yes X
   b. Does the patient take medication as prescribed? No__ Yes X

5. Has the patient ever had occupational or physical therapy for the condition in question? No X Yes ____ If yes, what date(s), where and for how long? ____

6. Do you recommend that the Department request a statement of your patient's Psychological Condition? No X Yes____ Visual Acuity? No X Yes ____

7. Do you recommend any driving restrictions? No X Yes___ If yes, please specify: ____

8. Do you recommend the Dept. conduct a periodic driving evaluation? No X Yes ___ How often: ____

9. Should the Dept. require periodic medical evaluation to monitor changes which may affect driving? No X Yes ___ How often: ____

10. Please include any additional information you feel will help in assessing your patient's ability to safely operate a motor vehicle: *Between manic episodes, which are brief and require hospitalization, Mr. Mueller is asymptomatic*

Certification:

I certify that the statements contained in this statement of examination are true to the best of my knowledge and belief.

DOCTOR'S SIGNATURE *s/William C. Bucknam MD* DATED *Nov 11, 1995*

Name (Print or Type) *William C. Bucknam*
Address *5340 Plymouth Rd #207 Ann Arbor MI 48105*
Professional License No. *043167* Telephone No. *(313) 747-7114*
Type of Practice or Medical Specialty *Psychiatry*

APPENDIX J

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

SHERYL KNIGHT and STEVE KNIGHT,	Civil Action No. #96-2725-NI
Plaintiffs, vs KARL OTTO MUELLER, Defendant.	Honorable Melinda Morris

[EXCERPTS FROM]

The Discovery Deposition of KARL OTTO MUELLER – VOLUME 1, the Defendant herein, taken pursuant to Notice of Taking Deposition, before Catherine L. Albin, CSR-5980, a Notary Public within and for the County of Wayne, State of Michigan, at 200 North Center Street, Northville, Michigan, on Friday, October 11, 1996, commencing about 9:45 o'clock in the forenoon.

APPEARANCES:

ROBERT B. JUNE, ESQ P51149
Simkins & Simkins, P.C.
200 North Center Street
Northville, Michigan 48167-1416

For the Plaintiffs.

JOSEPH K. BACHRACH, ESQ. P25498
Becker, Lanctot, McCutcheon,
Schoolmaster, Taylor & Hom
1700 First Federal Building
Detroit, Michigan 48226-1963

For the Defendant.

Northville, Michigan
Friday, October 11, 1996

About 9:45 o'clock, a.m.

KARL OTTO MUELLER,

the Defendant herein, having been first duly sworn by the Notary Public, testified as follows:

...

[pp. 25-27]

[Note: Dr. Bucknam's name was incorrectly transcribed in the record as Dr. Buckman. His name has been corrected here.]

Q: I'm wondering in relation to after the accident happened about how long was it before the police arrived.

A: Perhaps ten to fifteen minutes.

Q: You say this Dr. Bucknam arrived after the accident as well; is that right?

A: Yes.

Q: What's Dr. Bucknam's first name?

A: William S. Bucknam.

Q: Did Dr. Bucknam arrive before or after the police?

A: I'm not sure.

Q: Do you know how Dr. Bucknam knew to go to the accident scene?

A: I had met Dr. Bucknam at his office on Plymouth Road, and we were going to go over to St. Joseph's Hospital.

Q: So was he following you?

A: I believe I was following him.

Q: Do you know – did he explain how he found you, how he learned that you had been in an accident?

A: No.

Q: So he was on his way to St. Joseph's Hospital, and you were following him; is that right?

A: Yes.

Q: And then you had this accident. And so he was continuing on his way to St. Joseph's Hospital and you were no longer following him; is that right?

A: I don't know.

Q: Do you know if he actually saw the accident?

A: I don't know.

...

[pg. 28]

Q: Were you having a manic episode at the time of the accident?

A: I think I was in the beginning of having a manic episode.

...

[pp. 31-34]

Q: According to your interrogatory, this is number thirty-two, it states that at the time of the accident, "I was coming from 5340 Plymouth Road in Ann Arbor and going to St. Joseph's Hospital"; is that correct?

A: Yes.

Q: Is 5340 Plymouth Road the office of Dr. Bucknam?

A: Yes, it is.

Q: Was anybody else with you while you were going from Dr. Bucknam's office to St. Joe's?

A: No.

Q: Was anybody else with Dr. Bucknam while he was going to St. Joe's, to the best of your knowledge?

A: To the best of my knowledge, no.

Q: Again, he was driving first and you were driving second; is that right?

A: Yes. I believe so.

Q: You mentioned that you were getting ready to take a turn when the accident happened; is that right?

A: I think so. Yes.

Q: And I want to show you your answer to Interrogatory No. 33.

A: Yes.

Q: Actually, I'm sorry. Number thirty-four.

A: Okay.

Q: It says, "I was driving on Dixboro Road going to St. Joseph's Mercy Hospital. I slowed to turn into the parking lot. I saw an oncoming car in the distance that I assumed was not driving above the speed limit. I looked over into the parking lot to see that my path was clear. I turned and plaintiff's and my car collided." Is that correct?

A: Yes.

Q: Is that an accurate description of how you recall the accident?

A: Yes.

Q: What parking lot is it that you were turning into?

A: I'm not sure.

Q: Let me explain why I'm confused. In answer to number thirty-two, you say you're going from Dr. Bucknam's office, basically, to St. Joe's; is that right?

A: Yes.

Q: And you were following him?

A: Yes.

Q: Did he turn into the parking lot?

A: I think so.

Q: There's a parking lot off of Dixboro Road by the Huron River?

A: I don't know.

Q: It is on Dixboro Road between the Huron River and Huron River Drive where the accident occurred; is that correct?

A: Yes.

Q: Is that where you were going to the parking lot there?

A: I was going to St. Joseph's Hospital.

Q: Why would you be turning into a parking lot between Huron River and Huron River Drive?

A: I don't know.

...

[pp. 80-81]

Q: You had taken your medication on the day of this accident?

A: Yes.

Q: Nevertheless, you had a manic episode?

A: Yes.

Q: So you did have the symptoms despite taking the medication?

A: Say that again.

Q: Did you have the symptoms of your condition despite that you had taken your medication?

A: At that time, I was questioning whether or not I did, and that is why I called up Dr. Bucknam and had an appointment with him, and let him make that decision.

Q: So you were having questions about whether you were entering into a manic episode; is that right?

A: Yes.

Q: You went to see Dr. Bucknam for that?

A: Yes.

Q: It's in some relation to that that you were traveling to St. Joseph Hospital; is that correct?

A: Yes.

Q: And that's when this accident happened; is that right?

A: Yes.

Q: During the accident you were having a manic episode; right?

A: I don't know if I can say I was having a manic episode or I was at the beginning of a manic episode.

...

[pg. 85]

Q: When you're in a manic episode, do you know it?

A: I don't.

APPENDIX K

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

SHERYL KNIGHT and STEVE KNIGHT,	Civil Action No. #96-2725-NI
Plaintiffs,	Honorable Melinda Morris
vs	
KARL OTTO MUELLER, Defendant.	

The Discovery Deposition of WILLIAM C. BUCKNAM, M.D. – VOLUME 1, a Witness herein, taken pursuant to Notice of Taking Deposition, before Catherine L. Albin, CSR-5980, RPR, a Notary Public within and for the County of Wayne, State of Michigan, acting in the County of Oakland, at 26777 Central Park Boulevard, Suite 275, Southfield, Michigan, on Monday, January 20, 1997, commencing at 9:13 o'clock in the forenoon.

APPEARANCES:

ROBERT B. JUNE, ESQ P51149
Simkins & Simkins, P.C.
200 N. Center Street
Northville, Michigan 48167-1416

For the Plaintiffs.

DENNIS M. KILLEEN, ESQ. P29773
Becker, Lanctot, McCutcheon,
Schoolmaster, Taylor & Hom
1700 First Federal Building
Detroit, Michigan 48226

For the Defendant.

JOHN PATRICK O'LEARY, ESQ. P18464
O'Leary, O'Leary, Jacobs,

Mattson & Perry, P.C.
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076

For William G. Bucknam, M.D.

Southfield, Michigan
Monday, January 20, 1997
About 9:13 o'clock, a.m.

WILLIAM C. BUCKNAM, M.D., a Witness herein, having been first duly sworn by the Notary Public, testified as follows:

[EXCERPTS]

...

[pp. 7-9]

BY MR. JUNE

Q: Dr. Bucknam, I understand from talking with you in order to set up this deposition that you didn't actually see the collision that occurred, but that you were driving by and stopped as a good Samaritan; is that correct?

A: That is correct.

Q: Okay. Before I get on with that, could you just give us your full name, please?

A: William Carlin, C-a-r-l-i-n, Bucknam, B-u-c-k-n-a-m.

Q: You are a medical doctor?

A: Yes.

Q: Where is your professional address?

A: 5340 Plymouth Road, Number 207, Ann Arbor.

Q: As I was saying, you did not actually see the collision but were driving by and stopped as a good Samaritan; is that correct?

A: That's correct.

Q: Could you just take your time and tell me as best as you recall what you saw when you came upon the accident scene?

A: I saw Karl Mueller's vehicle in the lane of oncoming traffic, where the head-on collision had just occurred.

Q: Where was this?

A: Immediately south of the Dixboro Dam bridge.

Q: I want to show you a diagram that's included with what was Exhibit 2 of Karl Mueller's deposition. It's a diagram from the police report, and it shows vehicles on what appears to be the Dixboro Road Dam bridge. Does that appear to be approximately where the cars were when you saw them?

A: Yes.

Q: So they were actually on the bridge?

A: On the bridge then.

Q: Can you tell me, looking at one and two, the vehicles identified as one and two in this drawing, which one was Mr. Mueller's?

A: One.

Q: Was his car in the wrong lane of the road over the bridge?

A: Yes, it was.

Q: And they had had a head-on collision?

A: Yes.

...

[pg. 13]

Q: Did you talk with anyone else at the scene of the accident?

A: I spoke with a police officer.

...

[pp. 13-14]

Q: Can you describe the driver of the other vehicle besides Mr. Mueller?

A: No, I can't.

Q: Do you remember anything about that person?

A: No, I don't.

Q: Do you know if it was a man or a woman?

A: Only after the fact.

Q: What do you mean by that?

A: That the name Sheryl, I believe, is a woman's name, so I presume that the driver was a woman.

Q: Did you approach Ms. Knight at the accident at all?

A: No, I did not.

...

[pp. 14-15]

Q: You didn't make any observations one way or the other regarding whether Ms. Knight was injured?

A: No, I did not.

Q: So she could have been injured, and you don't know it -

A: That's correct.

...

[pp. 18-19]

Q: Okay. Had you observed Mr. Mueller's driving at any time that day prior to this occurrence?

A: Yes, I had.

Q: And when was that?

A: I observed his driving from my rearview mirror.

Q: At what time?

A: Probably about six-forty p.m.

Q: Where were you traveling?

A: I was traveling on Dixboro.

Q: From Plymouth Road?

A: From Plymouth Road.

Q: To Huron River Drive?

A: To Huron River Drive.

Q: Did you perceive him in your rearview mirror as you proceeded down Huron River Drive?

A: Yes, I did. I believe I did.

Q: Did you perceive him in your mirror as you turned into Saint Joe's Hospital?

A: Yes.

Q: At that point, did he turn around and take off?

A: I didn't see him do so.

...

[pp. 19-20]

Q: Well, you lost track of him?

A: Yes.

Q: Down at Saint Joe's Hospital?

A: Um-hmm.

Q: About how far is that from the bridge? Do you know?

A: Slightly over a half a mile.

Q: Which parking lot were you going in?

A: Emergency room.

MR. KILLEEN: I'm sorry. What did you say?

THE WITNESS: Emergency room.

BY MR. JUNE

Q: So as you're proceeding down Huron River Drive, you come to a point where it curves over towards Clark, and there are two entrances to Saint Joe's; is that right? The first one is a regular entrance, the second one's the emergency entrance; is that right?

A: That's right.

Q: And you were going in the emergency entrance?

A: Yes.

...

[pp. 20-21]

Q: When you realized that Mr. Mueller was no longer with you, did you turn around to go look for him?

A: I realized that he was no longer there about twenty minutes after I was waiting in the emergency room area. I went back into the parking lot to see if he was still parked and waiting in his car, perhaps, for me, was my thought at the time.

Q: And you didn't see him?

A: I did not see him in the parking lot at that time.

Q: So then you proceeded to go back toward your office?

A: In the direction of my office.

Q: Were you going home?

A: I was going home.

Q: And that's when you came upon the accident?

A: That is when I came upon the accident.

...

[pg. 24]

Q: Did you drive Mr. Mueller away from the accident scene?

A: Yes, I did.

Q: In your vehicle?

A: In my vehicle.

...

[pg. 26]

Q: Dr. Bucknam, did you tell the police officer that Mr. Mueller was having a manic episode?

A: Yes, I did.

...

[pg. 27]

Q: Mr. Mueller has testified that he met you at your office prior to going over towards Saint Joe's; is that correct?

MR. O'LEARY: You can respond.

A: That is correct.

...

[pp. 29-30]

Q: Why didn't you drive Mr. Mueller over to Saint Joe's from your office?

MR. O'LEARY: Objection. And you're not obliged to respond to that, for sure. That's not an area of inquiry that is in any way material or germane to these proceedings.

APPENDIX L

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

SHERYL KNIGHT and STEVE KNIGHT,

Case No.: 96-2725-NI
Hon. Melinda Morris

Plaintiffs,
vs
KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
jointly and severally,

Defendant(s).

DEPONENT: WILLIAM C. BUCKNAM, M.D.

DATE: Wednesday, January 21, 1998

TIME: 10:30 a.m.

LOCATION: O'Leary, O'Leary, Jacobs, Mattson, Perry & Mason
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076

REPORTER: Mary Jo Griffin, RPR/CSR-6279

APPEARANCES:

SIMKINS & SIMKINS, P.C.
By: Mr. Robert B. June
200 North Center Street
Northville, Michigan 48167
(248) 349-6030

Appearing on behalf of Plaintiff(s).

BECKER, LANCTOT, McCUTCHEON, SCHOOLMASTER, TAYLOR & HOM
By: Mr. Dennis M. Killeen
150 West Jefferson, Suite 1300
Detroit, Michigan 48226

(313) 237-5658

Appearing on behalf of Defendant(s) Karl Otto Mueller.

O'LEARY, O'LEARY, JACOBS,
MATTSON, PERRY & MASON
By: Mr. John Patrick O'Leary
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076
(248) 799-8260

Appearing on behalf of Defendant(s) William C. Bucknam, M.D.

...

[pg. 4]

Southfield, Michigan
Monday, January 21, 1998
10:30 a.m.

MR. JUNE: Let the record reflect that this is the deposition of William C. Bucknam, M.D., being taken in this matter pursuant to Notice for all purposes allowed under the Michigan Court Rules and Michigan Rules of Evidence.

WILLIAM C. BUCKNAM, after having been first duly sworn, was examined and testified as follows:

[EXCERPTS]

...

[pg. 17]

BY MR. JUNE

Q: If a person is experiencing symptoms of a manic episode, at that time is their disorder – at that time is their disorder in remission?

A: No.

...

[pg. 18]

Q: (By Mr. June) Are there any reference books that you utilize in your diagnosis and treatment of bipolar disorder?

A: Yes.

Q: What textbooks?

A: DSM-IV.

Q: DSM, is that called the Diagnostic and Statistical Manual of Mental Disorders?

A: Yes.

Q: Are there any others?

A: No.

APPENDIX M

[EXCERPTS FROM]

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS

FOURTH EDITION

DSM-IV™

PUBLISHED BY THE
AMERICAN PSYCHIATRIC ASSOCIATION
WASHINGTON, DC

...

Manic Episode

Episode Features

A Manic Episode is defined by a distinct period during which there is an abnormally and persistently elevated, expansive, or irritable mood. This period of abnormal mood must last at least 1 week (or less if hospitalization is required) (Criterion A). The mood disturbance must be accompanied by at least three additional systems from a list that includes inflated self-esteem or grandiosity, decreased need for sleep, pressure of speech, flight of ideas, distractibility, increased involvement in pleasurable activities or psyched motor agitation, and excessive involvement in pleasurable activities with a high potential for painful consequences. If the mood is irritable (rather than elevated or expansive), at least four of the above symptoms must be present (Criterion B). The symptoms do not meet criteria for a Mixed Episode, which is characterized by the symptoms of both a Manic Episode and a Major Depressive Episode occurring nearly every day for at least a

1-week period (Criterion C). The disturbance must be sufficiently severe to cause marked impairment in social or occupational functioning or to require hospitalization, or it is characterized by the presence of psychotic features (Criterion D). The episode must not be due to the direct physiological effects of a drug of abuse, a medication or other somatic treatments for depression (e.g., electroconvulsive therapy or light therapy) or toxin exposure. The episode must also not be due to the direct physiological effects of a general medical condition (e.g., multiple sclerosis, brain tumor) (Criterion E).

[...]

Inflated self-esteem is typically present, ranging from uncritical self-confidence to marked grandiosity, and may reach delusional proportions (Criterion B1).

[...]

Expansiveness, unwarranted optimism, grandiosity, and poor judgment often lead to an imprudent involvement in pleasurable activities such as buying sprees, reckless driving, foolish business investments, and sexual behavior unusual for the person, even though these activities are likely to have painful consequences (Criterion B7). The individual may purchase many unneeded items (e.g., 20 pairs of shoes, expensive antiques) without the money to pay for them. Unusual sexual behavior may include infidelity or indiscriminate sexual encounters with strangers.

The impairment resulting from the disturbance must be severe enough to cause marked impairment in functioning or to require hospitalization to protect the individual from the negative consequences or actions that result from poor judgment (e.g., financial losses, illegal activities, loss of employment, assaultive behavior). By definition, the presence of psychotic features during a Manic Episode constitutes marked impairment of functioning (Criterion D).

[...]

Associated Features and Disorders

Associated descriptive features and mental disorders. Individuals with a Manic Episode frequently do not recognize that they are ill and resist efforts to be treated.

[...]

Criteria for Manic Episode

A. A distinct period of abnormally and persistently elevated, expansive, or irritable mood, lasting at least 1 week (or any duration if hospitalization is necessary).

B. During the period of mood disturbance, three (or more) of the following symptoms have persisted (four if the mood is only irritable) and have been present to a significant degree:

(1) inflated self-esteem or grandiosity
(2) decreased need for sleep (e.g., feels rested after only 3 hours of sleep)
(3) more talkative than usual or pressure to keep talking
(4) flight of ideas or subjective experience that thoughts are racing
(5) distractibility (i.e., attention too easily drawn to unimportant or irrelevant external stimuli)
(6) increase in goal-directed activity (either socially, at work or school, or sexually) or psychomotor agitation
(7) excessive involvement in pleasurable activities that have a high potential for painful consequences (e.g., engaging in unrestrained buying sprees, sexual indiscretions, or foolish business investments)

C. The symptoms do not meet criteria for a Mixed Episode (see p. 335).

D. The mood disturbance is sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others, or to necessitate hospitalization to prevent harm to self or others, or there are psychotic features.

E. The symptoms are not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication, or other treatment) or a general medical condition (e.g., hyperthyroidism).

Note: Manic-like episodes that are clearly caused by somatic antidepressant treatment (e.g., medication, electroconvulsive therapy, light therapy) should not count toward a diagnosis of Bipolar I Disorder

APPENDIX N

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASTENAW

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs,

Case No. 96-2725-NI

v

HON. MELINDA MORRIS

KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
jointly and severally,

Defendants.

CHARLES N. SIMKINS (P 24990)
ROBERT B. JUNE (P 51149)
SIMKINS & SIMKINS, P.C.
Attorneys for Plaintiffs
200 N. Center Street
Northville, Michigan 48167-1416
(248) 349-6030

DENNIS M. KILLEEN (P 29773)
BECKER, LANCTOT, McCUTCHEON,
SCHOOLMASTER, TAYLOR & HOM
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Detroit, Michigan 48226
(313) 237-5658

JOHN PATRICK O'LEARY (P 18464)
KEVIN P. HANBURY (P 39468)
O'LEARY, O'LEARY, JACOBS, MATTSON,
PERRY & MASON
Attorneys for Defendant, William C. Bucknam, M.D.
26777 Central Park Boulevard, Suite 275
Southfield, Michigan 48076-4165

(248) 799-8260

AFFIDAVIT OF GERALD A. SHIENER, M.D.

County of Washtenaw }
}ss
State of Michigan }

Gerald A. Shiener, M.D., first being duly sworn, deposes and says:

1. I am Gerald A. Shiener, M.D., a diplomat of the American Board of Psychiatry and Neurology with added qualifications in addiction psychiatry and forensic psychiatry.

2. I have reviewed several documents pertaining to this matter, including Plaintiffs' Second Amended Complaint, the transcript of the deposition of William C. Bucknam, M.D.; the transcript of the deposition of Karl Otto Mueller; the police report, and a Physician's Statement of Examination filed with the Michigan Department of State.

3. I have knowledge of the facts and opinions contained herein, I am competent and qualified to testify to those facts and opinions, and I will do so if called as a witness in this action.

4. Based on my review of the above-mentioned documents:

   A. On October 3, 1995, Karl Otto Mueller submitted himself to the care of his psychiatrist, William C. Bucknam, M.D., while Mr. Mueller was experiencing the symptoms of a manic episode;

B. Dr. Bucknam determined that Mr. Mueller was in fact experiencing a manic episode;

C. Dr. Bucknam had a lengthy history of treating Mr. Mueller for manic episode, and Dr. Bucknam knew that Mr. Mueller has impaired judgment, delusions, and bizarre behavior during a manic episode;

D. A decision was made to admit Mr. Mueller for emergency psychiatric treatment at St. Joseph Mercy Hospital in Ann Arbor, Michigan;

E. Rather than arranging transportation for Mr. Mueller from Dr. Bucknam's office to St. Joseph Mercy Hospital, it was arranged for Mr. Mueller to drive his own vehicle and follow Dr. Bucknam to the emergency room at the hospital;

F. During this journey, Mr. Mueller crossed the center line of Dixboro Road and collided head-on with a vehicle driven by Sheryl Knight.

5. It is my opinion that Dr. Bucknam was negligent in not arranging transportation for this patient, but rather allowing the patient to drive to the hospital in his own vehicle, and this negligence resulted in the accident in which Sheryl Knight was injured.

Further Affiant sayeth not.

s/Gerald A. Shiener, M.D.

Subscribed and sworn to before

Me on October 21, 1997
s/Sandy M. Zander
Notary Public, Oakland County, MI
My Commission Expires Sept. 29, 2001
Acting in Wayne

APPENDIX O

CURRICULUM VITAE

Gerald A. Shiener, M.D.

Address: Office: 251 Merrill
Birmingham, Michigan 48009
(Private Practice)

Home: 6156 Pickwood Drive
West Bloomfield, Michigan 48322

Birthdate: July 19, 1949

Citizenship: U.S.A.

Married: Karen Rosen
November 27, 1974

Children: Loren Renee
Born February 6, 1986

David Samuel
Born September 12, 1987

Education:

1967-71 Wayne State University, Monteith College
Wayne State University, College of Liberal Arts
Research Assistant in Psychology for Gerald Cook, Ph.D., Northville State Hospital and Lafayette Clinic
Research Assistant in Psychology for Gerald Rosenbaum, Ph.D., Lafayette Clinic
B. A. in Psychology

1971-75 Michigan State University College of Human Medicine
Research Assistant in Psychophysiology for Norman Kagan, Ph.D.
Student Representative to Michigan State Medical Society
Summer Research Fellow, National Institute Mental

Health
Vice-President, Local Chapter of the Student American Medical Association
Doctor of Medicine Degree granted by Michigan State University

Training:

1975-76	Resident in Psychiatry, Sinai Hospital of Detroit 9 months – Inpatient service 2 months – Neurology service 1 month – Emergency psychiatry service
1976-77	Resident in Psychiatry, Sinai Hospital of Detroit 3 months – Emergency psychiatry service 3 months – Day Hospital service --Problems of Daily Living Clinic 5 months – Adolescent psychiatry, Lafayette Clinic
1977-78	3 months – Honorary Clinical Assistant, London Hospital Medical College, for Professor Desmond Pond, M.D., D.P.M., F.R.C. Psych. Resident in Psychiatry, Sinai Hospital of Detroit 10 months – Outpatient service 10 months – Psychogeriatrics consultant to Jewish Home for the Aged, Detroit, Michigan 10 months – Consultation service for Physical Medicine and Rehabilitation Department, Sinai Hospital of Detroit
1978	Residency in Psychiatry completed, Sinai Hospital of Detroit

Faculty Appointments:

1978-	Clinical Instructor, Department of

Psychiatry, Michigan State University, College of Human Medicine

1978- Assistant Professor, Department of Psychiatry, Wayne State University, School of Medicine

1988- Assistant Professor, Department of Anesthesiology, Wayne State University, School of Medicine

Hospital Appointments and Positions: Current

1978- Attending Staff, Sinai Hospital of Detroit

1978- Attending Staff, Mount Carmel Mercy Hospital

1980- Attending Staff, William Beaumont Hospital, Royal Oak

1982-90 Attending Staff, Kingswood Hospital, Ferndale, Michigan

1982- Psychiatric Consultant, Jewish Home for the Aged

1983- Chief, Consultation-Liasion Psychiatry, Sinai Hospital of Detroit
Psychiatric Consultant, Department of Anesthesiology Pain Clinic, Sinai Hospital of Detroit

1986- Psychiatric Consultant, City of Detroit Department of Police

Director, Obsessional Disorders Treatment Unit (Anafranil Study)

1989-91 Attending Staff, Margaret Montgomery Hospital

1990- Psychiatric Consultant, State of Michigan Attorney Discipline Board

1990-92 Pontiac General Hospital, Pontiac, Michigan

1991-92	State of Michigan, Department of Mental Health, Psychotropic Drug Use Committee
1993	Sinai Hospital of Detroit, Dementia Research and Treatment Unit, Cognex Research Protocol
	Surveyor, Commission on Accreditation of Rehabilitation Facilities

Hospital Appointments: Past

1978-81	Chief, Crisis Intervention Service, Sinai Hospital of Detroit
1978-81	Chief, Crisis Intervention, Mt. Carmel Mercy Hospital
1981-82	Associate Chief, Day Hospital, Sinai Hospital of Detroit

Professional Organizations:

1979-	American Psychiatric Association
1979-	Michigan Psychiatric Society
1979-	Oakland County Medical Society
1979-80	Member, Michigan Psychiatric Society, Committee on Emergency Care
1976-77	Chairman, Michigan Psychiatric Society Committee on Residents
1986	American Academy of Psychosomatic Medicine
1989	American Society of Addiction Medicine

Licensure:

1976	State of Michigan
1977	United Kingdom
1979	State of California

Board Certification:

1980	Certified by the American Board of

Psychiatry and Neurology

1991 Certified by the American Society of Addiction Medicine

Honors and Awards:

1977-78 Chief Resident

1978-79 Harry E. August Award for outstanding performance as a resident

1984 Outstanding Faculty Member, Sinai Hospital of Detroit

Publication:

1976-77 Clinical Case Report "Pituitary Adenoma with Secondary Hypothyroidism Presenting as Manic Depressive Psychosis" abstracted in The Sinai Bulletin

1991 "Acute Psychoses"; "Anxiety Disorders" in The Clinical Practice of Emergency Medicine, Harwood-Nuss, Editor. J. B. Lippincott, New York 1990

"When the Patient Becomes Agitated: Diagnosis and Management of the Acutely Psychotic Medical Patient" Patient Care 25:14 Sept 1991

1993 "The Agitated Acutely Psychotic Patient" American College of Emergency Physicians Study Guide ACEP Press 1993

Presentations:

1985: "Management of Common Pain Syndromes" Michigan State Medical Society Winter Meeting

1986: "Evaluation of the Acute Psychiatric Patient"

"Management of Behavioral Emergencies" American College of Emergency Physicians Scientific Assembly – Atlanta, Ga.

1987: "Evaluation of the Acute Psychiatric Patient"
"Management of Behavioral Emergencies" American College of Emergency Physicians Annual Meeting – San Francisco, Ca.

1988: "Evaluation of Psycho-Behavioral Emergencies"
"Suicide – Risk Evaluation and Management"

"Evaluation of Altered Mental Status in the Emergency Room" American College of Emergency Physicians Annual Meeting – New Orleans, La.

1989: "Psychological Management of Malignant Pain" Michigan Cancer Foundation Winter Scientific Meeting

1989: "Evaluation and Treatment of Sexual Disorders" Michigan State Medical Society Winter Meeting

1990: "Pain Patient – Evaluation and Management" Grand Rounds, Detroit Psychiatric Institute

"Beyond a Shadow of a Doubt – Psychiatric Intervention in the Rehabilitation of the Traumatic Brain Injured Patient" William Beaumont Hospital Rehabilitation Conference

"Evaluation of Psycho-Behavioral Emergencies"
"Evaluation of Altered Mental Status in the Geriatric Patient"
American College of Emergency Physicians Annual Meeting – San Francisco, California

"Clinical Evaluation of the Suicidal Patient" Michigan State Medical Society – Winter Meeting

"Depression and Suicide in the Closed Head Injured Patient" Michigan Head Injury Alliance – Annual Meeting, Flint, Michigan

1991: "Psychiatry and The Law" State Bar of Michigan, Worker's Compensation Section Winter Meeting

"Evaluation of Psycho-Behavioral Emergencies" American College of Emergency Physicians Annual Meeting -- Boston, Massachusetts

"Management of Common Pain Syndromes" Grand Rounds, Department of Psychiatry University of Texas Southwestern, Dallas, Texas

"Chronic Pain" Dallas – Fort Worth Physical Medicine and Rehabilitation Society

1992: "Electroconvulsive Treatment in the Medically Ill Patient" Michigan Psychiatric Society – Winter Meeting

"Dual Diagnosis in the Traumatic Brain Injured Patient" New Medicos Second Annual Conference on Brain Trauma Rehabilitation

1993: "Diagnosis and Management of Chronic

Pain" Grand Rounds, Department of Neurology Henry Ford Hospital, Detroit, Michigan

"Anxiety Disorders – Post Traumatic Stress Disorders and Obsessive-Compulsive Disorder" Bournwood Hospital – Harvard University, Boston, Massachusetts

"Management of Chronic-Pain Patients" Grand Rounds, Sheppard Pratt Hospital Towsen, Maryland

APPENDIX P

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASTENAW

SHERYL KNIGHT and STEVE KNIGHT,

Plaintiffs,

v

Case No. 96-2725-NI
Honorable Melinda Morris

KARL OTTO MUELLER, and
WILLIAM C. BUCKNAM, M.D.,
Jointly and Severally,

Defendants.

CHARLES N. SIMKINS (P24990)
ROBERT B. JUNE (P 51149)
Attorneys for Plaintiffs
200 N. Center Street
Northville, MI 48167-1416
(810) 349-6030

DENNIS M. KILLEEN (P29773)
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1700 First Federal Building
Detroit, MI 48226
(313) 237-5658

JOHN PATRICK O'LEARY (P18464)
Attorney for Dr. Bucknam
26777 Central Park Boulevard
Suite 275
Southfield, MI 48076
(248) 799-8260

DEFENDANT DR. BUCKNAM'S MOTION FOR SUMMARY DISPOSITION

NOW COMES Defendant, William Bucknam, M.D., by his attorneys, O'LEARY, O'LEARY, JACOBS, MATTSON, PERRY & MASON, P.C., and for his Motion for Summary Disposition states unto this Honorable Court as follows:

1. This lawsuit was begun as an automobile negligence action as between the Plaintiffs and Defendant Mueller. (Exhibit A; Plaintiffs' Complaint)

2. Defendant Mueller stated at the scene of the accident that he was "having a manic episode." (Exhibit B; Traffic Accident Report)

3. During discovery it was learned that Defendant Mueller was treating with psychiatrist Dr. Bucknam.

4. It was further learned that Defendant Mueller had seen Dr. Bucknam on the day of the accident.

5. Plaintiffs sought leave to amend their Complaint to add Dr. Bucknam as a party defendant claiming Dr. Bucknam "knew or should have known that Mr. Mueller was suffering from a serious psychiatric disorder...and would pose an increased risk of injury to other persons if he were permitted to drive." (Exhibit C: Plaintiffs' Second Amended Complaint, ¶ ¶ 19-20).

6. Defendant Mueller has exercised his patient-physician privilege thereby barring from evidence inquiry into any aspects of his treatment with Dr. Bucknam including his medical records and discussion of test results, counselling and medications.

7. On March 11, 1997, Plaintiffs filed a Motion to Deem the Patient-Physician Privilege Waived.

8. Defendants Mueller and Bucknam filed responses to same.

9. Concurrent therewith, Defendant Bucknam also filed a Motion to Dismiss given the Plaintiffs' failure to

comply with the Michigan Medical Malpractice Tort Reform Act regarding the notice provisions. MCLA 600.2912b

10. This Honorable Court denied Plaintiffs' Motion to Deem the Patient-Physician Privilege Waived thus barring from evidence introduction of Mr. Mueller's medical records and testimony by Dr. Bucknam about any aspect of Dr. Bucknam's psychiatric treatment of Mr. Mueller. The Court, however, further rules that any matter already disclosed by Mr. Mueller was not privileged; i.e., Mr. Mueller's statement to the police that he was having a "manic episode". (Exhibit D)

11. In an Opinion and Order dated April 21, 1997, the Court denied Defendant Dr. Bucknam's Motion to Dismiss stating, in party, "while Plaintiff cannot maintain a medical malpractice action against Dr. Bucknam, she may pursue a claim sounding in negligence. Under the factual circumstances of this case, a third-party has a claim grounded in negligence against the Defendant based upon that Defendant's relationship with another party." (Exhibit E)

12. While Defendant Dr. Bucknam believes the Court correctly recognized Defendant Mueller's right to exercise his patient-physician privilege and thus restrict from evidence Mr. Mueller's medical records and testimony regarding same, in so doing, it presents a situation in which Dr. Bucknam is unable to receive a fair trial because it is those same records and testimonial evidence about his patient-physician relationship with Mr. Mueller which forms the basis for Dr. Bucknam's defense.

13. The right to present a defense is basic in every lawsuit. People v Colling, 168 NW2d 447; 16 Mich App 574 (1969).

14. Dr. Bucknam's constitutional right to due process is violated by his inability to present pertinent evidence in his defense (i.e., the medical records and

testimony regarding same) to the claims being asserted against him.

15. The Michigan Supreme Court, the Supreme Court of Wisconsin have recognized that it is a fundamental violation of due process to deny a party the opportunity to present pertinent evidence. Dation v Ford Motor Co, 314 Mich 152 (1946); Kelly v Ford Motor Co, 280 Mich 378 (1937); Madison Airport Co v Wrabetz, 231 Wis 147; 285 NW 504 (1938); Minty v Ford Estate, 336 Mich 370 (1993); and Maki v Mohawk Mining Co, 176 Mich 497 (1913).

16. Regardless of whether the Complaint against Dr. Bucknam is considered one of negligence or malpractice, Plaintiffs will have to prove a breach in the applicable standard of care by Dr. Bucknam in this treatment of Mr. Mueller. Welke v Kuzilla, 144 Mich App 245 (1985)

17. Without Dr. Bucknam's office records or testimony regarding his care, treatment and evaluation of Mr. Mueller, there is simply no foundation upon which any expert witness can offer a qualified, credible opinion as to the propriety of Dr. Bucknam's actions in allowing Mr. Mueller to drive.

18. No credible psychiatric witness can offer "expert" testimony in this case without the requisite foundation and knowledge as exists in the medical records and as would be testified to by Dr. Bucknam; any opinions offered without such a foundation would be pure speculation.

19. Board certified psychiatrist Dr. Dan Guyer, who was asked to review what materials could be provided to him regarding this matter, attests that it would be pure speculation for him to render an expert opinion as to whether or not Dr. Bucknam did what a reasonable physician of ordinary learning, skill and judgment would do under the same or similar circumstances without the benefit

of reviewing, at a minimum, Mr. Mueller's medical records. (Exhibit F)

20. Similarly, any psychiatric expert retained by the Plaintiffs would lack the requisite foundation to offer an informed opinion as to the propriety of Dr. Bucknam's actions without the opportunity to review the medical records or testimony regarding that relationship.

21. The United States District Court for the Eastern District of Michigan Southern Division, the Michigan Supreme Court and the Michigan Court of Appeals have all addressed situations where an expert's testimony was based on sheer speculation. In each such situation, the courts have granted summary disposition (or a directed verdict) in favor of the defendant finding the proffered experts' opinions to be inadmissible. Pommella v Regency Coach Lines, Ltd, US Dist Ct ED of Mich So Div, No 93-75459, decided Oct 3, 1995; Amorello v Monsanto Corp, 186 Mich App 324 (1990); Garabedian v William Beaumont Hospital, 450 Mich App 985 (1996); and Bemis v William Beaumont Hospital, 450 Mich App 872 (1995). (A copy of Pommella, supra, is attached as Exhibit G).

22. No Michigan court in a similar situation has both upheld the patient-physician privilege thereby denying access to relevant, foundational medical records and denied summary disposition. Landelius v Rafko, 443 Mich 470 (1996).

23. In the case at bar, the Plaintiffs have asserted a claim based solely upon the patient-physician relationship that existed between Mr. Mueller and Dr. Bucknam and Mr. Mueller's statement at the accident that he was having a manic episode.

24. Recognizing the complaint is based on the premise of that relationship, Dr. Bucknam has a right to defend himself with that relationship.

25. What is used as a sword may also be used as a shield; however, when the shield is taken away from Dr. Bucknam, so is his right to defend himself.

WHEREFORE, Defendant, Dr. Bucknam, respectfully requests that this Honorable Court grant his Motion for Summary Disposition pursuant to the Michigan Constitution, Article II, Section 16; the 14th Amendment to the Federal Constitution; MCR 2.116(C)(10) and the case law cited herein.

Respectfully Submitted,

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Dated: September 17, 1997

Supreme Court, U.S.
FILED
OCT 18 2001
CLERK

No. 01-351

In The Supreme Court of the United States

SHERYL KNIGHT and STEVE KNIGHT, PETITIONERS

v.

WILLIAM C. BUCKNAM, M.D., RESPONDANT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Since the issues Petitioner seeks to have this Court accept for review were neither properly raised nor addressed by either the Michigan court of appeals or Michigan supreme court, and since the issue as to the propriety of the Court of Appeals granting summary disposition deals with the factual findings and the asserted misapplication of a properly stated rule of law, and since the trial court and court of appeals were correct, should this Court decline jurisdiction over the Petition for Writ of Certiorari?

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No. 01-351

IN THE SUPREME COURT OF THE UNITED STATES

SHERYL KNIGHT and STEVE KNIGHT, PETITIONERS

v.

WILLIAM C. BUCKNAM, M.D., RESPONDANT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF JURISDICTION

This Court does not have and should not invoke jurisdiction in this matter. Petitioner has cited 28 U.S.C. §1257(a) as the basis for this Court's jurisdiction. That section provides that the Supreme Court may review, by writ of certiorari, final judgments rendered by the highest court of a State with respect to issues of federal law "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. "

It is only final judgments with respect to issues of federal law that provide the basis for the appellate jurisdiction of the United States Supreme Court with respect to state court cases. *New York Times Co. v Jascalevich*, 439 U.S. 1317, 99 S. Ct. 6, 58 L. Ed. 2d 25 (1978). The federal question must have been raised and decided in the state court. If this is not demonstrated in the record of the proceedings below, the appellate jurisdiction of the Supreme Court fails. *Illinois v Gates*, 462 U.S. 213, 103 S. Ct. 33, 77L.Ed. 2d 1453 (1983). Since the issuance of a writ of certiorari is discretionary the presence of jurisdiction upon petition for such writ does not determine the

exercise of such jurisdiction. *Hammerstein v Superior Court of California,* 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. (1951).

Part III of the Rules of the Supreme Court governs Jurisdiction on Writ of Certiorari. Rule 10 under that part makes clear that review on such a writ is wholly discretionary:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted ***only for compelling reasons***." (Emphasis supplied.)

With respect to state court decisions, the rule indicates the character of the reasons the Court considers in exercising its discretion to grant a writ of certiorari:

> "(b) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Finally, Rule 14 makes clear that appeals involving factual findings or errors of law will rarely be accepted. Petitioners seek this Court to invoke its jurisdiction to a review a decision of the state court which involves factual findings and errors of law and this Court should not accept the petition.

For the reasons more fully stated in the section entitled "Argument for Denying Writ", this Court should decline jurisdiction over this case.

COUNTER-STATEMENT OF CONSTITUTIONAL PROVISIONS INVOLVED

Respondent denies that there are any constitutional provisions, treatises or statutes involved in this case sufficient to invoke this Court's jurisdiction. While Petitioners have set forth a number of constitutional provisions they claim are at issue, Respondent denies that any of those provisions are applicable here.

COUNTER STATEMENT OF FACTS

Simply because a party has exhausted the appellate procedure in state court does not automatically entitle that party to an appeal in this Court. This case serves as the perfect example of one in which jurisdiction should be declined. In reviewing the petition for writ of certiorari, it should be kept in mind that the last court that ruled on any issues presented below, not necessarily issues that are now presented to this Court, was the Michigan court of appeals and that Petitioners' application for leave to appeal to the Michigan Supreme court was denied as was their motion for reconsideration. Moreover, it should be noted that Petitioners' second issue was not raised in the Michigan supreme court until their motion for reconsideration. It is quite clear that the issues Petitioners now seek this Court to accept for review were never properly raised or addressed below and should be rejected by this Court.

In an apparent effort to satisfy the federal question requirement of 28 U.S.C. 1257 (a), Petitioner has represented to this Court that this case "tests

both the constitutionality of a statutory physician-patient privilege and the constitutionality of the court's power to render summary disposition". On clear review of the petition for writ of certiorari and the record from the proceedings below, this Court will recognize no federal question issues ever raised by Petitioner or decided by the Michigan Court of Appeals. The constitutionality of Michigan's physician-patient privilege, MCL 600.2157;MSA 27A.2157, as applied to Petitioners' claim in this matter, has never been addressed by Petitioners and certainly was not addressed by the Michigan court of appeals. Petitioners seek acceptance of the writ of certiorari solely on the basis of the application of the physician-patient privilege to Dr. Bucknam. The arguments, however, are wholly absent any representation of how dismissal of Dr. Bucknam violated ***any of Petitioners' constitutional rights***. Petitioners' argument to attempt to obtain federal question jurisdiction is completely convoluted and wholly without merit.

Petitioners also seek to obtain jurisdiction by arguing that the Court of Appeals should not have decided factual issues. Well established federal and state law approves the summary disposition or judgment procedure. This Court has made clear that it rarely accepts a petition for writ of certiorari when the asserted errors consist of erroneous factual findings or the misapplication of a properly stated rule of law. Hence this Court should decline any review of the factual findings of the Michigan Court of Appeals and it should thus decline any exercise of its jurisdiction in this matter.

Factual Background

This action arises out of an October 3, 1995 automobile collision involving Karl Mueller and Petitioner Sheryl Knight. At approximately 7:00 p.m. on that date, Mr. Mueller was traveling northbound on Dixboro Road near the intersection of Huron River

Drive when his vehicle crossed the center lane and collided with a southbound vehicle driven by Sheryl Knight. Mr. Mueller had been following Respondent Dr. Bucknam to St. Joseph Mercy Hospital at approximately 6:40 p.m. on the evening of the accident. Dr. Bucknam observed Mr. Mueller in his rearview mirror as he turned into the hospital, then lost track of him as he proceeded to the hospital emergency room. Dr. Bucknam waited for Mr. Mueller for approximately 20 minutes in the emergency room area, then returned to the parking lot to see if Mr. Mueller was possibly waiting in his car. Because Mr. Mueller was not in the parking lot, Dr. Bucknam headed home and came upon the accident scene.

Facts Regarding Physician-Patient Relationship

Karl Mueller asserted the physician-patient privilege on the issue of his medical treatment by Dr. Bucknam which precluded Dr. Bucknam from testifying in that regard.

Petitioners subsequently filed a second amended complaint adding Dr. Bucknam as a Defendant. In essence, the allegations against Dr. Bucknam in the second amended complaint asserted that his "special relationship" with Karl Mueller gave rise to a duty to protect third persons that might foreseeably be injured by unsafe driving on the part of Mr. Mueller.

Thereafter, Petitioners filed a motion to deem the physician/patient privilege waived, arguing that certain "disclosures" by Mr. Mueller constituted a waiver of the physician/patient privilege. Karl Mueller, responded contending that Mr. Mueller had not raised his psychological condition as a defense, had not brought it in as an issue and had not in any way waived the privilege.

Dr. Bucknam also filed a Response to the Motion, indicating that the physician/patient privilege, embodied in MCL 600.2157 strictly prohibited Dr. Bucknam from disclosing any

information he might of obtained in the context of the physician/patient relationship, and Dr. Bucknam, therefore, requested that the Court not enter any Order which compelled Dr. Bucknam to disclose any medical information regarding Mr. Mueller absent an express or implied waiver of the physician/patient privilege. The trial court denied Petitioners' motion to deem physician-patient privilege waived.

Summary Disposition Motions

Subsequently, on or about September 17, 1997, Dr. Bucknam filed motion for summary disposition, arguing that his constitutional right to due process would be violated under the circumstances of this case, given his inability to present any pertinent evidence in his defense, because he was precluded from discussing any aspect of his care and treatment of Mr. Mueller.

Further, without Dr. Bucknam's office records or any testimony regarding his care, treatment and evaluation of Mr. Mueller, there was simply no foundation upon which any expert witness could credibly offer opinions as to the propriety of Dr. Bucknam's interactions with Mr. Mueller on the night of the accident. In support of the motion, Dr. Bucknam offered the Affidavit of expert witness and Board Certified psychiatrist, Dr. Dan Guyer, who testified to his belief that it would be pure speculation to attempt to make any valid opinion about Dr. Bucknam's professional relationship with Mr. Mueller without the benefit, at a minimum, of a thorough and detailed analysis of the patient's record of testing, duration and nature of treatment, counseling and medication, as well as Dr. Bucknam's own evaluations.

In response, Petitioners argued that a private assertion of a privilege is not a "state action" sufficient to give rise to a due process claim, that there was sufficient evidence of Dr. Bucknam's liability such that the Court should render summary judgment in

favor of the Petitioners and that Dr. Bucknam "supported" the assertion of the physician/patient privilege, thus waiving his due process rights.

The trial court subsequently entered a written Opinion & Order granting Dr. Bucknam's motion for summary disposition. After reviewing the parties' respective positions, the court found that the action of a state court upholding the physician/patient privilege constituted a "state action" within the meaning of the 14th Amendment. It further held that Dr. Bucknam had not waived his due process rights by acquiescing in the privilege, because the privilege belonged only to the patient, Mr. Mueller. Whether Dr. Bucknam agreed with or supported Mr. Mueller's right to the privilege was held by the trial court to be immaterial. Because Mr. Mueller had asserted the privilege, the court was required to exclude any evidence of Dr. Bucknam's treatment of Mueller. Because the "heart of the physician's defense is contained in the patient records," the court was compelled to grant summary disposition in favor of Dr. Bucknam.

Appeals

Petitioners appealed to the Michigan Court of Appeals arguing that the trial court erred in finding that Mueller had not waived his physician patient privilege, Dr. Bucknam did not waive his due process rights in supporting the physician-patient privilege and that Defendant Bucknam's due process rights were violated by the enforcement of the physician-patient privilege. They also argued that the trial court erred in granting Defendant Bucknam's Motion for Summary Disposition (and in failing to grant Plaintiffs' partial summary disposition) on Bucknam's liability.

On April 28, 2000, the Court of Appeals issued a per curiam opinion affirming the trial court's order. *Knight v Mueller*, unpublished opinion per curiam of the Court of Appeals, decided 4/28/2000 (Docket No. 212478) In a detailed, well analyzed opinion, the Court concluded that the trial court did not abuse its

discretion in concluding that Mueller did not waive the physician-patient privilege by providing certain medical information.

The Court of Appeals also concluded that summary disposition in Dr. Bucknam's favor was appropriate, though on different grounds than the trial court provided. The Court of Appeals specifically found that Petitioners failed to present sufficient evidence to create a material factual dispute regarding Bucknam's negligence. Specifically, the Court concluded that Petitioners' documentary and testimonial evidence failed to establish that Bucknam breached the standard of care; i.e., no evidence was produced regarding the type of care Bucknam provided to Mueller on the day of the accident or that Bucknam knew, when he met with Mueller, that the latter was unfit to drive. The affidavit presented from Petitioners' expert offered only speculative conclusions insufficient to establish a genuine issue of material fact.

Petitioners filed a motion for rehearing which was promptly denied and then filed application for leave to appeal to the Michigan Supreme Court on the basis that the Court of Appeals erred in failing to grant Petitioners' summary disposition on liability and in granting summary disposition in favor of Dr. Bucknam. Petitioners also argued in support of leave that the Court of Appeals and the trial court erred in upholding the physician-patient privilege and the trial court erred in concluding that Dr. Bucknam's due process rights were violated by the privilege and in granting summary disposition in that regard. By order entered February 26, 2001, the Michigan Supreme Court denied Petitioners' application for leave to appeal "because we are not persuaded that the questions presented should be reviewed by this Court."

It is significant to note that in neither their court of appeals brief nor in their application for leave

to appeal to the supreme court did Petitioners raise any argument that their constitutional rights were violated by any of the rulings of the trial court or of the court of appeals. Exhibit G. Nor did Petitioners ***ever*** argue that the physician-patient privilege embodied in MCL 600.2157;MSA 27A.2157 was unconstitutional.

Not until Petitioners' motion for reconsideration filed after denial of their application for leave to appeal in the supreme court did Petitioners raise any constitutional issues. Therein Petitioners argued that the court of appeals decision granting Dr. Bucknam summary disposition violated their right to a jury trial and due process. The Michigan supreme court apparently disagreed, denying the motion for Reconsideration by order entered May 29, 2001.

Petitioners now seek a writ of certiorari on the basis, argued for the first time, that the Michigan physician-patient privilege is unconstitutional and the Michigan Court of Appeals erred in making factual findings and granting summary disposition in Dr. Bucknam's favor. None of the arguments raised properly invoke this Court's jurisdiction and the petition for writ of certiorari should be denied.

ARGUMENT FOR DENYING WRIT

1. This Court does not have and should not invoke jurisdiction in this matter. Petitioner cited 28 U.S.C. §1257(a) as the basis for this Court's jurisdiction. That section provides that the Supreme Court may review, by writ of certiorari, final judgments rendered by the highest court of a State "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."

Part III of the Rules of the Supreme Court governs Jurisdiction on Writ of Certiorari. Rule 10 under that part makes clear that review on such a

writ is wholly discretionary and will be granted "***only for compelling reasons***."

With respect to state court decisions, the Court will consider a decision in which a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals or where a state court has decided an important question of federal law that has not been, but should be, settled by this Court.

It is only final judgments with respect to issues of federal law that provide the basis for the appellate jurisdiction of the United States Supreme Court with respect to state court cases. *New York Times Co. v Jascalevich,* 439 U.S. 1317, 99 S. Ct. 6, 58 L. Ed. 2d 25 (1978/The federal question must have been raised and decided in the state court. If this is not demonstrated in the record of the proceedings below, the appellate jurisdiction of the Supreme Court fails. *Illinois v Gates.* 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 reh den 463 U.S. 1237, 104 S. Ct. 33, 77 L.Ed.2d 1453 (1983). In *Adams v Robertson,* 520 U.S. 83, 117 S> Ct. 1028, 137 L.Ed.2d 203 (1997). this Court set forth a detailed analysis of the rule in reviewing state court judgments under 28 U.S.C. 1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision it has been asked to review. The rule serves an important interest of comity, *Id.*, citing *Bankers Life & Casualty v Crenshaw,* 486 U.S. 71-77-78, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62 (1988): "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams, supra; Webb v Webb,* 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981).

When the highest state court is silent on a federal question before this Court, this Court will

assume that the issue was not properly presented. *Adams, supra, 520 U.S. at 87-88*, citing *Board of directors of Rotary Int'l v Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987). The aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented here." *Adams, supra,* quoting *Webb, supra.*.

The Court in *Adams* went further to describe different ways that a petitioner may satisfy the requirement that they demonstrate that the state court had the opportunity to address the federal question sought to be reviewed. Petitioners can establish that the claim was raised "at the time and in the manner required by the state law" *Adams, supra, 520 U.S. at 87* and the cases cited therein, or that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment, or that it presented the particular claim at issue with "fair precision and in due time". *Id.*

In furtherance of the requirement that petitioners must demonstrate that the federal question was raised below, Rule 14 (g) (i) of the Supreme Court Rules sets forth the requirements for the content of a petition for writ of certiorari. If review of a state court judgment is sought, the petitioner must specify and cite to the stage in the proceedings were the federal questions which are sought to be reviewed are raised: "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari."

The petition in this case is absent any reference to the stage in the proceedings below in which any federal question having any bearing on Petitioners' claims was raised. It is clear from a reading of the

petition that the reason for this absence is because ***there is no federal question.***

Petitioners contend that Michigan's physician-patient privilege is unconstitutional. Yet this issue was never raised or decided below and Petitioners have not identified any reference to the record in which the issue was addressed. It is duly noted that in their "Statement" Petitioners have discussed "constitutional" issues addressed by the trial court which were at issue in Dr. Bucknam's motion for summary disposition. See petition, pp. 9-12. However, the only constitutional issues raised were raised by Dr. Bucknam. Specifically, he argued that the trial court's ruling that the physician-patient privilege had not been waived effectively denied Dr. Bucknam the opportunity to properly defend the action and thus denied his Due Process rights under the Fourteenth Amendment and under the Michigan Constitution. Petitioners never argued at this stage of the proceedings that the physician-patient privilege also resulted in a violation of their constitutional rights. The only constitutional rights raised were those of Dr. Bucknam.

The trial court agreed finding that the action of the state court and its judiciary upholding the privilege was a state action within the meaning of the fourteenth amendment sufficient to give rise to ***Dr. Bucknam's*** due process rights. See Petitioners' App. B, 14a. The trial court never addressed any issues relative to the constitutionality of the physician-patient privilege or that Petitioners were denied any constitutional rights as a result of the application of the privilege. The petition is simply absent any references to the proceedings or record which would establish that Petitioners ever raised the issue they now seek this Court to address.

On appeal to the Court of Appeals, Petitioners contend that they raised the issue of a violation of their Due Process rights. However, it should be noted

that the passage quoted from Petitioners' Brief on Appeal to the Court of Appeals, is contained in the Argument entitled "THE TRIAL COURT ERRED IN FINDING THAT . . . BUCKNAM'S CONSTITUTIONAL DUE PROCESS RIGHTS WERE DEPRIVED BY DEFENDANT MUELLER'S ASSERTION OF THE PHYSICIAN-PATIENT RELATIONSHIP." As noted by the Court in *Adams, supra,* the discussion of a "federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim. *Id., 520 U.S. at 88,* quoting *Board of Directors of Rotary Int'l, supra, at 550, n.9.* Nor would such a discussion be proper to bring the issue before the Michigan Court of Appeals in any event. Under Michigan law, issues raised for the first time on appeal, including constitutional challenges are not preserved for appeal. *Harkins v Dep't of Natural Resources,* 206 Mich App 317, 520 NW2d 653 (1994), lv den 447 Mich 1017, 527 NW2d 507 (1994). Moreover, the issue was not properly presented in Petitioners' statement of questions presented and thus the Court of Appeals would not consider it. *Richmond Twp v Erbes,* 195 Mich App 210, 489 NW2d 504 (1992), lv den 441 Mich 931, 498 NW2d 737. Petitioners cited no authority for the proposition that the physician-patient privilege is unconstitutional and the Court of Appeals would decline to review the issue on that basis as well. The reviewing court will not search for authority to sustain or reject a party's position where the party failed to cite authority in support of his position. An appellant may not merely announce his position and then leave it to the court to discover and rationalize the basis for his claim. *Dep't of Treasury v Central Wayne County Sanitation Authority,* 186 Mich App 58, 463 NW2d 120 (1990).

The issue was not properly raised on appeal and the Petitioners never sought reversal of the lower court on the basis that their constitutional rights had been violated. In fact, Petitioners admitted that the

very argument they are now advancing, citing *People v Stanaway, 446 Mich 643, 521 NW2d 557 (1994)* for the proposition that cautious disclosure rather than dismissal of the defendant is proper, was effectively abandoned by Petitioners in the Court of Appeals. As noted by Petitioners in their brief in the Court of Appeals "[I]n a civil action, of course, the confrontation clause does not apply, and there does not appear to be any other constitutional right that has been recognized for similar protections" App. I, excerpted portions of Petitioners' Brief on Appeal in the Michigan Court of Appeals.

The only reference in the petition that MCL 600.2157;MSA 27A.2157 is unconstitutional is at pp. 18-19, a reference which wholly supports Respondent's position that Petitioners have failed to articulate a federal question. As set forth by Petitioners: "However, we continue to question whether the legislative enactment and judicial enforcement of Michigan's statutory physician-patient privilege, MCL § 600.2157, can be construed as a deprivation of Dr. Bucknam's Due Process rights in a manner that justified dismissal of petitioner' claims in this case." The only constitutional right identified in the above statement is that of Dr. Bucknam and ***not Petitioners'.***

It is clear the Petitioners seek to invoke this Court's jurisdiction solely on the basis that constitutional provisions formed a basis for the court, in the first instance, granting summary disposition in favor of Dr. Bucknam. This seems to be the reverse of the usual situation where jurisdiction might be proper in the case where a ruling of the lower court directly deprives the petitioner of some right or directly involves some federal question. In this case, however, Petitioners' claim appears to be that the trial court erroneously upheld Respondent's constitutional rights which ultimately resulted in an unfavorable result to Petitioners, i.e., dismissal of their claim. But, as

noted above, Petitioners have never argued, nor could they in this instance, that their due process rights were violated by upholding the physician-patient privilege.

Nor did the Court of Appeals ever address any of the constitutional grounds for reversal of the lower court's grant of summary disposition. Rather, as noted above in the Statement of Facts, the Court affirmed on the basis that Petitioners failed to present sufficient evidence to create a material factual dispute regarding Bucknam's negligence. When the highest state court is silent on a federal question before this Court, this Court will assume that the issue was not properly presented. *Adams, supra, 520 U.S. at 87-88.*

Petitioners' reliance on *Jaffee v Redmond,* 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), in an effort to establish a federal question as to the constitutionality of the physician-patient relationship is wholly misplaced. A clear reading of *Jaffee* reflects that it supports the application of the privilege in this case and carried to its logical conclusion supports the dismissal of Dr. Bucknam. In *Jaffee,* the petitioner's decedent had been fatally shot by the respondent a police officer. During the course of the civil proceedings, the petitioner sought to obtain notes made by a clinical social worker with whom respondent had counseled. Respondent contended that the notes were protected against disclosure by a psychotherapist-patient privilege. The district judge disagreed and ordered that the notes be disclosed. Neither respondent nor the social worker complied with the order.

At trial, the jury awarded the petitioner damages after being instructed that the refusal to turn over the notes was legally unjustified and the jury could presume that the notes would have been unfavorable to respondent. The Court of Appeals reversed and remanded recognizing the psychotherapist-patient privilege but finding that the

privilege would not apply if, in the interests of justice, the evidentiary need for disclosure outweighed the patient's privacy interests.

This Court agreed with the Court of Appeals recognizing that a psychotherapist-patient privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for probative evidence." *Jaffee, supra, 518 U.S. at 10-11.* This Court went further than the Court of Appeals, however, in protecting the effectiveness of the privilege by rejecting the balancing component of the privilege implemented by the Court of Appeals noting that such a component eviscerates the effectiveness of the privilege:

> "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we noted in *Upjohn [Co v United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682 66 L.Ed.2d 584 (1981)]*, if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.' ***An uncertain privilege, or one which purports to be certain but results in widely varying applications by the court, is little better than no privilege at all.***" *Jaffee, supra, 518 U.S. at 17-18.*

Application of the physician-patient privilege in this case comports with this Court's reasoning in

Jaffee, rejecting the "balancing component" which Petitioners advocate in advancement of their petition. The Michigan statutory privilege serves the same purpose as noted in *Jaffee* –protection of confidential communications in the context of the physician-patient relationship. It is the outcome in this case with which petitioners take issue; yet it is an outcome anticipated and acknowledged by the Court in *Jaffee* as acceptable in furtherance and protection of the privilege. Contrary to Petitioners assertions, *Jaffee* most certainly does not serve as a basis for making a claim that the Michigan physician-patient privilege is unconstitutional and thus establishing a federal question.

In an effort to seek review of the lower court's opinion, Petitioners initially contend that the Michigan statutory physician-patient privilege embodied in MCL 600.2157 is unconstitutional. On closer examination of the petition, however, Petitioners take issue with the ***trial court's*** conclusion that the privilege was applicable and that, as a result of the application of the privilege, Dr. Bucknam's due process rights were infringed. As noted above, the Michigan court of appeals concluded that there was no waiver of the privilege. This conclusion has not been stated as one from which the Petitioners claim error. Also, as noted above, the Court of appeals ***never addressed*** the other claimed errors, specifically, "whether the private assertion of a privilege . . . can amount to "state action," "whether Dr. Bucknam has preserved any right he has to a Due Process remedy in thiscase, given that Dr. Bucknam supported the enforcement of the privilege" and whether the appropriate remedy is cautious disclosure." See petition for writ of certiorari, pg. 19. To the extent these issues were not addressed by the Michigan Court of Appeals or the Michigan Supreme Court, they are not properly before this Court and the Court should, therefore, decline jurisdiction. In the event the Court does decide to

review the issues set forth in the petition for writ of certiorari, the trial court should be affirmed since its conclusions were correct.

In ruling upon Defendant Dr. Bucknam's motion to dismiss, the trial court cited *Welke v Kuzilla,* 144 Mich App 245, 252, 253, 375 NW2d 403 (1985), as setting forth those facts which plaintiff must prove in this type of claim, regardless of whether the claim sounds in malpractice or negligence, as including a breach of the applicable standard of care by the doctor in the treatment of the patient. Clearly, the assertion of the physician/patient privilege by Mr. Mueller, and the court's upholding of the privilege, precludes Dr. Bucknam from introducing any evidence in his defense to a claim that Mr. Mueller suffered from a psychiatric condition such that Dr. Bucknam should have prevented him from operating a motor vehicle on the evening of this accident. Dr. Bucknam was therefore figuratively bound and gagged, unable to present his own testimony or that of any independent expert witnesses (who would have neither access to Mr. Mueller's psychiatric records nor the benefit of Dr. Bucknam's testimony) in his defense.

The Michigan Supreme Court has held that a law which would in effect shut out the evidence of a party and deny him the opportunity for a fair trial deprives that party of due process of law. *Kelly v Ford Motor Co,* 280 Mich 378, 273 NW2d 737 (1937):

> The trial court properly held that its upholding of the physician/patient privilege constituted a "state action" within the provisions of the 14th Amendment guaranteeing due process of law. This well known principle was addressed in *Shelley v Kramer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed.2d (1948): [t]he courts may not be used to destroy rights which are protected against infringement

> or deprivation by the constitutional guarantees of due process and equal protection of the laws.
>
> * * *
>
> Moreover, the protection of the 14th Amendment against infringement by the state **extends to judicial as well as legislative action.**" *Shelley, supra, at page 9* and the cases cited therein.

The physician/patient privilege is a "state action" having been created by the legislature and embodied as statutory law, MCL 600.2157;MSA 27A.2157. The Michigan Supreme Court has held that the statute "creates a substantive right to prevent disclosure of a confidential communication made to facilitate medical treatment . . ." *Domako v Roe,* 438 Mich 347, 475 NW2d 30 (1991). This "substantive right" belongs to the patient and **can only be waived by the patient**. *Scott v Henry Ford Hosp,* 199 Mich App 241, 501 NW2d 259 (1993); *Gaertner v Michigan,* 385 Mich 49, 53, 187 NW2d 429 (1971). Contrary to what is indicated in plaintiff's brief, it was not Mr. Mueller's personal assertion of the physician/patient privilege, but rather the legislative and judicial action in enacting the statute and enforcing the privilege in this instance, which constitutes "state action" triggering a deprivation of constitutional guarantees of due process.

Petitioners maintain that Dr. Bucknam "waived" his due process rights by "supporting" Mr. Mueller's right to assert the physician/patient privilege. Petition, p 19. This argument cannot withstand the slightest scrutiny. First, because the privilege belongs exclusively to Mr. Mueller and cannot be waived by anyone but Mr. Mueller, the trial court was entirely correct in noting that any "position" which Dr. Bucknam took on the issue is irrelevant and immaterial. See *Scott v Henry Ford Hospital,*

supra, and *Gaertner v Michigan, supra.* Additionally, Dr. Bucknam was and remained Mr. Mueller's treating psychiatrist. It would be wholly unethical, once Mr. Mueller had chosen to assert the privilege (well before Dr. Bucknam had any involvement in this lawsuit), for Dr. Bucknam to exert pressure on Mr. Mueller to waive the privilege, or to seek to have the trial court order disclosure of his medical records over Mr. Mueller's assertion of the privilege. It would be utterly violative of the physician/patient relationship for Dr. Bucknam to attempt to force disclosure of confidential communications to protect his own interests at the patient's expense and, most importantly, the trial court had no legal authority to order disclosure of Mr. Mueller's medical records over his assertion of the physician/patient privilege, because the Michigan Court Rules, MCR 2.302(B), flatly provides that privileged information is not discoverable.

Petitioners' contention that Mr. Mueller's medical records should be subject to "in camera" inspection by the trial court pursuant to *Stanaway, supra* is equally erroneous. As Petitioners concede, the due process considerations raised in *Stanaway* related to the deprivation of liberty, not the potential swag from a dubious civil lawsuit. *Id, 521 NW2d at 567.* Moreover, the Supreme Court specifically stated in *Stanaway* that "[t]he State's interest in preserving the confidentiality of social worker, diversion, and rape counseling records must yield to a ***criminal*** defendant's due process right to a fair trial when the defendant can show that those records are likely to contain information necessary to his defense." (Emphasis added). *Id, 521 NW2d at 575.* Additionally, the decision in *Stanaway* construed United States Supreme Court decision in *Pennsylvania v Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d (1987). The *Stanaway* court noted that the U.S. Supreme Court's rationale for upholding in camera inspection was the fact that the records were

those of a government agency, and that defendants have a due process right to obtain evidence in the possession of a prosecutor if it is favorable to the accused and material to guilt or punishment. Stanaway, supra. These types of due process considerations are simply not relevant in a civil case, and Petitioners have cited no Michigan appellate decisions which provide for in camera inspections in this context (nor, it is important to note, do Petitioners suggest in any fashion how or under what circumstances psychiatric records could properly be disclosed following an in camera inspection).

Rather, Michigan appellate decisions have held that the physician/patient privilege set forth in MCL 600.2157 outweighs a party's purported need for the information in a civil action, and is an absolute bar to such disclosure. *Dierickx v Cottage Hosp Corp,* 152 Mich App 162, 393 NW2d 564, 567 (1986) which is in accord with *Jaffee, supra..*

2. Petitioners also seek the writ of certiorari on the basis that the Court of Appeals improperly granted summary disposition and in doing so violated Petitioners Due Process rights and right to jury trial. The Court should decline jurisdiction as to this issue as well since Petitioners failed to establish jurisdiction under 28 U.S.C. 1257.

Rule 14 of the Rules of the Supreme Court, as quoted above, makes clear that appeals involving factual findings or errors of law will rarely be accepted. Moreover, this issue was never properly raised in nor addressed by the Michigan Supreme Court so this Court should decline jurisdiction. See Appendix G. While Petitioners address a claimed violation of a right to a jury trial under Michigan Constitution, Article I, §14 and the United States Constitution, Amend. VII, See Appendix J, the issue was neither raised in Petitioners' statement of questions presented nor properly presented to the Court. As noted above, the discussion of a "federal

case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim. *Id., 520 U.S. at 88*, quoting *Board of Directors of Rotary Int'l, supra, at 550, n.9.* Nor would such a discussion be proper to bring the issue before the Michigan Court of Appeals in any event. The issue was not properly presented in Petitioners' statement of questions presented and thus the Court of Appeals would not consider it. *Richmaond, supra.* . Moreover, Petitioners cited no authority or argument for the proposition that their right to a jury trial was violated. The reviewing court will not search for authority to sustain or reject a party's position where the party failed to cite authority in support of his position. An appellant may not merely announce his position and then leave it to the court to discover and rationalize the basis for his claim. *Dep't of Treasury, supra.*. In any event, the argument was raised ***only*** in the context of the Court of Appeals rejecting the affidavit of Petitioners' expert Dr. Schiener as "speculative at best". It was not raised as a challenge to the Court of Appeals granting summary disposition based on all the evidence before it. The Supreme Court may fairly well have read this section as arguing only that the Court of Appeals violated Petitioners' due process rights by rejecting only the affidavit of Dr. Scheiner and not as a challenge to the Court of Appeals decision granting summary disposition based on all the evidence before it.

The Court of Appeals was correct in concluding that summary disposition was proper under defendant Bucknam's alternative theory – that plaintiffs failed to present sufficient evidence to create a material factual dispute regarding defendant's negligence. It should be briefly noted that Petitioners have misrepresented to this Court certain of the trial court's findings on this issue. According to Petitioners, the trial court found that there was "some evidence of negligence" on Dr.

Bucknam's part which had not been appealed. See Petition, pp. 15, 23. This is simply not true. The trial court ***never*** ruled on the issue of Bucknam's negligence and certainly ***never***, as Petitioners so incorrectly contend, "found that there was some evidence of negligence." As the Court of Appeals correctly noted, the trial court never even reached the issue: "The trial court granted summary disposition for Bucknam based on the due process theory and **expressly declined to review Plaintiffs' Motion for Summary Disposition.** (Plaintiffs' Exhibit 5, to Application for Leave to Appeal, p. 2)(Emphasis added).

Michigan appellate courts review a motion for summary disposition, the equivalent of the federal motion for summary judgment, *de novo. Smith v Globe Life Ins Co, 460 Mich 446, 454, 597 NW2d 28 (1999).* The term *"de novo"* has been defined as "anew; afresh; again; a second time; once more; in the same manner or with the same effect." It has been said that "[t]he very concept of *'de novo'* hearing means that all matters therein issue are to be considered 'anew; afresh; over again.'". See *DCR v Siler Dollar Café*, 441 Mich 110, 490 NW2d 337 (1992). Thus the reviewing court, in reviewing a decision *"de novo"* may substitute its assessment for the findings, conclusions and decision of the lower court. *Id.*

In this case, no assessment of the facts had been undertaken by the lower court and the Court of Appeals was, therefore, required both by law and the procedural history of the case, to review the motion *de novo.* In reviewing the decision, the Court of Appeals correctly noted, citing *Phinney v Perlmutter,* 222 Mich App 513, 532, 564 NW2d 532 (1997), that it was not required to reverse where the trial court reached the right result for the wrong reason. Rather, given its power of *de novo* review it could properly grant summary disposition on a different basis. See also MCR 7.216(A)(7).

In evaluating a motion for summary disposition under MCR 2.110(C)(10) of the Michigan Court Rules, the court considers the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 597 NW2d 817 (1999). The reviewing court should evaluate a motion under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. *Id.* This rule is in accord with federal law in summary judgment. *Anderson v Liberty Lobby, Inc,* 477 U.S. 242, 250-251, 106 S.Ct. 2505, 9 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v Zenith Radio Corp,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

The Court of Appeals was well within its power and its ruling is not inconsistent with that of the trial court nor does it demonstrate any "shifting standards" as argued by Petitioners. Petitioners have completely misconstrued the Court of Appeals' analysis and the applicable case law. Plaintiffs' burden of proof is the same whether stated under *Welke, supra,* as cited by the trial court and the court of appeals or under *Duvall v Goldin,* 139 Mich App 342, 362 NW2d 275 (1984) , as cited by Petitioners.

The Court in *Welke* concluded that for reasons of public policy, Plaintiffs' claim was one properly sounding in medical malpractice. The Court went on to note that an action in medical malpractice is in essence a tort claim in negligence and, in order for Plaintiff to prove his claim against Defendant, whether

under negligence or malpractice, Plaintiffs must demonstrate the three elements as quoted by the Court of Appeals in this case. *Id.* The Court in *Welke* further noted that to hold that the plaintiff's action may sound in negligence, but not in medical malpractice, would be to exalt form over substance. *Welke, 375 NW2d at 406.*

It is clear from *Welke, Duvall* and other case law on this issue that Petitioners' burden of proof is the same whether the action sounds in medical malpractice or negligence. The burden on Petitioners to establish liability remains the same whether medical malpractice or negligence is alleged because the duty to the third-party necessarily arises out of the "special relationship", i.e., the professional relationship, between the defendant physician and the patient who causes injury. See *Duvall, supra, 362 NW2d at p. 277.* Where the actor stands in a special relationship with either the third-party victim or the person causing the injury, a duty of reasonable care may arise. *Id. at 278.* Absent this special relationship, the common-law rule applies that no one has a duty to protect an individual who is endangered by the conduct of another. *Duvall supra, 362 NW2d at 278.* Thus Petitioners must establish that a "special relationship" existed creating a duty on the part of Dr. Bucknam to procure knowledge and experience regarding the patient's condition. Cf.*Schultz v Consumer's Power Co,* 443 Mich 445, 506 NW2d 175, 178 (1993). Then Petitioners must prove a breach of that duty, i.e., a breach of the applicable standard of care. See e.g. *Davis v Lhim,* 124 Mich App 299, 335 NW2d 481 (1983).

As noted by the court in *Duvall, supra,* once a "special relationship" has been established either between the actor and the third-party victim or the actor and the person causing the injury, the court then must look to whether it was foreseeable that the actor's conduct might create a risk of harm to the

victim. See *Moning v Alfano,* 400 Mich 425, 254 NW2d 759 (1977). The court in *Duvall* discussed two cases from foreign jurisdictions in which the courts found that the injury to the third parties as a result of the defendant physician's patient's impaired driving ability was reasonably foreseeable to the doctor at the time he prescribed the drugs which impaired the patients' ability to drive. See *Gooden v Tips,* 651 SW2d 364 (Tex App 1983); *Kaiser v Suburban Transportation System,* 65 Wash 2d 461, 398 P2d 140, 401 P2d 350 (1965).

The court agreed that "given the nature of the condition involved, and accepting as true plaintiffs' allegations, it was foreseeable that ***a doctor's failure to diagnose or properly treat the patient may create a risk of harm to a third party***. Hence, in order to establish a claim against the doctor, the Plaintiffs must establish that the doctor breached the standard of care applicable to that doctor in his treatment and/or diagnosis of the patient.

It is clear that, contrary to Petitioners' argument, the Court of Appeals did not demonstrate any shifting burdens of proof. Rather, the Court correctly held that in an action against a physician for injuries sustained by a third party inflicted by the defendant physician's patient, must necessarily arise out of the "special relationship" between either the physician and the plaintiff or the physician and the patient. Absent such special relationship, the physician owes no duty to the plaintiff to protect the plaintiff from injuries inflicted by a third party. Once the special relationship is established, plaintiff must prove that it was foreseeable that the physician defendant's conduct i.e., the breach of the applicable standard of care, would create a risk of harm to the plaintiff.

The Court of Appeals was also correct in concluding that Petitioners failed to establish a genuine issue of material fact that Dr. Bucknam

breached the applicable standard of care. As noted by the Court of Appeals, Petitioners produced no evidence regarding the type of care Bucknam provided to Mueller the day of the accident or that Bucknam knew at the time he met with Mueller that he was unfit to drive. Moreover, the affidavit from Petitioners' expert psychiatrist in which he opined that Bucknam was negligent in allowing Mueller to drive to the hospital in his own vehicle was speculative at best since the expert did not independently examine Mueller and the evidence upon which he relied did not provide specific information regarding Bucknam's treatment of Mueller.

No credible psychiatric witness can offer "expert" testimony in this case without the requisite foundation and knowledge contained in the medical records. Board certified psychiatrist Dr. Dan Guyer, who was asked to review what materials that could be provided to him regarding this matter, attested that it would be pure speculation for him to render an expert opinion as to whether or not Dr. Bucknam did what a reasonable physician of ordinary learning, skill and judgment would do under the same or similar circumstances without the benefit of reviewing, at a minimum, Mr. Mueller's medical records.

Without Dr. Bueknam's records or testimony regarding his treatment and evaluation of Mr. Mueller, there is simply no foundation upon which any expert witness can offer a qualified, credible opinion as to the propriety of Dr. Bucknam's actions in allowing Mr. Mueller to drive. As the Michigan Court of Appeals concluded, any such testimony offered without having reviewed the medical records or having gained any understanding as to Mr. Mueller's diagnosis and treatment would be based on sheer speculation. Accordingly, Petitioners cannot establish a breach of the standard of care as it would apply to Dr. Bucknam.

The United States District Court for the Eastern District of Michigan, Southern Division, the Michigan Supreme Court and the Michigan Court of Appeals have all addressed situations where an experts' testimony was based on sheer speculation and was found insufficient to establish a claim. In each such situation, the courts have granted summary disposition (or a directed verdict) in favor of the defendant finding the proffered experts' opinions to be inadmissible. *Pomella v Regency Coach Lines, Ltd*, US Dist Ct ED of Mich So Div, No. 93-75459, decided Oct. 3, 1995; *Amorello v Monsanto Corp*, 186 Mich App 324, 463 NW2d 487 (1990); *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 528 NW2d 809 (1995), lv den 450 Mich 985, 547 NW2d 657 (1996); and *Bemis v Willaim Beaumont Hosp*, 450 Mich 872, 539 NW2d 503 (1995).

In *Pomella, supra*, the Honorable Jon Feikens granted summary disposition for the defendant, having found plaintiff's offered expert's testimony to be based on assumptions and possibilities and thus the plaintiff would be unable to prove by a preponderance of the evidence that the defendant's negligence resulted in her injuries because the opinion testimony of plaintiff's expert had to be excluded:

To allow such `proof' to come before a jury would disserve the principles expounded by the United States Supreme Court in the *Celotex* trilogy. See *Celotex Corp v Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). (after sufficient time for discovery, summary judgment is mandated `against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial); *Anderson v Liberty Lobby, supra*, (the mere existence of a scintilla of evidence in support of a plaintiff's position will be insufficient; there must be evidence on which the jury can reasonably find for the plaintiff); and , *supra*, (where

the record taken as a whole could not lead a rationale trier of fact to find for the nonmoving party, there is no genuine issue for trial.)

In *Garabedian, supra*, the Michigan Court of Appeals affirmed the circuit court's order granting a directed verdict in favor of the defendant finding, after a review of the testimony of plaintiff's offered expert witness, that the plaintiff's claim was based on mere speculation and conjecture.

And, in *Amorello, supra*, the Court of Appeals upheld summary disposition in favor of the defendant, stating that summary disposition is not precluded simply because a party has produced an expert to support his or her position, if the expert's opinions are not admissible. The Court found the plaintiff's expert's offered testimony was not based on reliable facts or data. Finally, in *Bemis, supra*, the Court of Appeals affirmed the trial court's granting of a directed verdict in favor of the defendant finding the plaintiff's expert's testimony to be "nothing more than conjecture" and that "such testimony cannot raise an issue of fact as to causation."

In this case, any psychiatric expert testimony that may be offered as to whether or not Dr. Bucknam breached the applicable standard of care in his treatment of Mr. Mueller without the benefit of having reviewed one page of the 12 year history of records that exist between Mr. Mueller and Dr. Bucknam and without the benefit of Dr. Bucknam being able to address questions under oath at deposition and at trial regarding that relationship would be based on exactly the type of **speculation and conjuncture** that courts have analyzed and time and time again and found to be meritless.

With respect to Plaintiff's claim that they were deprived their right to trial by jury by the Court of Appeals' holding, it should be noted that it is well established law that when there is no genuine issue with respect to any material fact and reasonable

minds could not differ regarding legal conclusions to be drawn from facts, summary disposition can be granted without violating the right to a jury trial. *Moll v Abbott Laboratories,* 444 Mich 1, 506 NW2d 816 (1993). In this case, the Court of Appeals properly granted summary disposition. Plaintiffs were, therefore, not deprived their right to trial by jury. In any event, this Court should decline jurisdiction since this issue was never properly raised in the Michigan Supreme Court nor did that Court ever address the issue. It is, therefore, not properly before this Court.

CONCLUSION

Since the issues Petitioner seeks to have this Court accept for review were neither properly raised nor addressed by either the Michigan court of appeals or Michigan supreme court, and since the issue as to the propriety of the Court of Appeals granting summary disposition deals with the factual findings and the asserted misapplication of a properly stated rule of law, and since the trial court and court of appeals were correct, this Court should decline jurisdiction over and deny the Petition for Writ of Certiorari.

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Supreme Court, U.S.
FILED
NOV 13 2001
CLERK

(3)

No. 01-351

In The

Supreme Court of the United States

SHERYL KNIGHT and STEVE KNIGHT,

Petitioners,

v.

WILLIAM C. BUCKNAM, M.D.,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

AMENDED REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the legislative enactment and judicial enforcement of Michigan's statutory physician-patient privilege, M.C.L. § 600.2157, deprived Dr. Bucknam [respondent] of his Due Process rights in a manner that justified dismissal of petitioners' claims in this case.

2. Whether the Michigan Court of Appeals deprived petitioners of their constitutional rights to due process of law and a jury trial when the court justified a grant of summary judgment by applying its own findings of fact to a standard of proof different than the standard imposed by the Washtenaw County Circuit Court and by weighing testimonial evidence, without remanding the case for factual determination.

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ARGUMENT IN REPLY TO BRIEF IN OPPOSITION

This petition for a writ of certiorari raises two constitutional questions of broad importance. The issues have been preserved properly, and they deserve the considered and deliberative review of this Court. Several of the points raised in respondent's brief in opposition are simply incorrect, and other points actually underscore the need for review of the questions presented in this petition.

1. Respondent mistakenly asserts that "[p]etitioners contend that Michigan's physician-patient privilege is unconstitutional." Brief in Opposition, p. 12. To the contrary, petitioners have always *challenged* the ruling that the physician-patient privilege worked a deprivation of respondent's due process rights under the Fourteenth Amendment sufficient to justify the dismissal of petitioners' claims. The question presented here by petitioners asks:

> 1. Whether the legislative enactment and judicial enforcement of Michigan's statutory physician-patient privilege, M.C.L. § 600.2157, deprived Dr. Bucknam of his Due Process rights in a manner that justified dismissal of petitioners' claims in this case.

Petitioners contend that the answer to this question must be "no." Petitioners do not agree that respondent suffered a deprivation of his Fourteenth Amendment rights, and petitioners do not agree that the dismissal of their claims would be an appropriate remedy if there were a due process deprivation.

Respondent also asserts that petitioners have failed to present their challenge at previous stages of these proceedings in accordance with *Adams v. Robertson*, 520 U.S. 83 (1997). Brief in Opposition, p. 9. Contrary to the assertion of respondent, petitioners have challenged this decision at length at every stage of the proceedings, and a summary of the previous challenges containing references to the record was included with the petition. Petition, pp. 12-16.

This constitutional issue was argued and decided at the proceedings of the trial court. *See* Petition, App. B, pp. 10a-16a. Petitioners then challenged this constitutional interpretation at length in their Appellant's Brief presented to the Michigan Court of Appeals. Petitioners argued that the trial court erred first in finding that there was a deprivation of respondent's due process rights on the grounds that a private individual's exercise of the physician-patient privilege was insufficient to satisfy the "state action" requirement underlying any due process claim. *See* petitioners' Appellant's Brief (on appeal to the Michigan Court of Appeals), pp. 34-39.

Petitioners further argued that respondent had waived his right to assert a claim that his constitutional rights had been violated when he supported the assertion of the physician-patient privilege against himself. *See* petitioners' Appellant's Brief (on appeal to the Michigan Court of Appeals), pp. 39-41; *D.H. Overmyer Co. v. Frick*, 405 U.S. 174, 185-86 (1972). Respondent opposed petitioners' motion that would have made respondent's records available for trial, but respondent then claimed that the denial of petitioners' motion was the state action that deprived respondent of his due process rights. By

refusing to request disclosure of these records, respondent waived his right to claim that lack of disclosure deprived him of his constitutional rights.

Petitioners also argued that, even if there was a due process deprivation present, the remedy of dismissing petitioners' claims was inappropriate. *See* petitioners' Appellant's Brief (on appeal to the Michigan Court of Appeals), pp. 32-34. After all, petitioners did not do anything to deprive respondent of access to the medical records at issue. Because the due process claim was predicated on a failure to disclose medical records, the proper remedy for a deprivation of those rights would be some form of disclosure, not dismissal of petitioners' claims.

These arguments were again presented at length to the Michigan Supreme Court. *See* petitioners' Application for Leave to Appeal (to the Michigan Supreme Court), pp. 49-63. Consequently, there can be no doubt that the Michigan Court of Appeals and the Michigan Supreme Court had "a fair opportunity to address the federal question that is sought to be presented here." *Adams v. Robertson*, 520 U.S. 83, 87 (1997), quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Finally, it should be noted that respondent claims on one hand that "[a]pplication of the physician-patient privilege in this case comports with this Court's reasoning in *Jaffee*," referring to *Jaffee v. Redmond*, 518 U.S. 1 (1996). Brief in Opposition, pp. 16-17. Yet, on another hand, respondent claims that the application of the physician-patient privilege was a state action that deprived him of his due process rights under the Fourteenth Amendment. Brief in Opposition, pp. 18-19. It is precisely

this contradiction that requires deliberative review by this Court. We contend that the physician-patient privilege contained in M.C.L. § 600.2157 did not work a deprivation of respondent's Fourteenth Amendment rights in this case, and even if there were a deprivation, we contend that the dismissal of petitioners' claims was not an appropriate remedy.

Petitioners Sheryl and Steve Knight certainly stand aggrieved by the decision of the trial court to dismiss their claims against respondent William C. Bucknam, M.D. The sole basis for this dismissal was the ruling of the trial court that the legislative enactment and judicial enforcement of the statutory physician-patient privilege were state actions that deprived respondent of his Fourteenth Amendment rights. Petitioners have challenged this ruling at every stage of the proceedings, and the questions presented for review have been properly preserved.

2. Respondent claims that the second issue presented by petitioners for review should be rejected because the issue involves facts. Brief in Opposition, pp. 2, 21. However, the question presented by petitioners actually addresses the constitutional limitations on the power of judges to decide facts in the context of a summary judgment motion. We contend that the Michigan Court of Appeals deprived petitioners of their constitutional rights to due process of law and a jury trial when the court justified a grant of summary judgment by applying its own findings of fact to a standard of proof different than the standard imposed by the trial court and by weighing testimonial evidence, without remanding the case for factual determination.

This Court has not shied away from cases delimiting the power of courts to grant summary judgment. *See, e.g., Kodak v. Image Technical Svcs.*, 504 U.S. 451 (1992); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Unlike previous cases, however, this case addresses the power of an appellate court to grant summary disposition by deciding facts. Respondent argues that, because "no assessment of the facts had been undertaken by the lower court," the Michigan Court of Appeals was empowered to make findings regarding the facts of the case in the course of *de novo* review. Brief in Response, p. 23. Petitioners disagree with this understanding of the scope of *de novo* review, which would essentially convert petitioners' right to a jury trial into a nullity.

This issue is raised with great clarity in this case particularly because the facts presented by petitioners were the factual admissions of respondent himself. As just one example, respondent claims that we do not have "the benefit of having reviewed one page of the 12 year history of records that exist between Mr. Mueller and Dr. Bucknam," leaving us to rely on "speculation and conjecture" regarding the facts of the case. Brief in Response, p. 29. But we actually do have Dr. Bucknam's signed report regarding Mr. Mueller, which was submitted to each of the previous courts reviewing this matter, and which is attached to the petition in this case as Appendix I. Petition, pp. 27a-32a. This report by Dr. Bucknam discusses the history and severe symptoms of Mr. Mueller's manic

condition, Dr. Bucknam's diagnoses, the medications prescribed, and the fact that the condition led to psychiatric hospitalization for a two-week period beginning on the day of the accident at issue in this case. Petition, App. I, pp. 29a-31a. We have no reason to believe that Dr. Bucknam's other records would contradict this report, and the report is signed by Dr. Bucknam just below a provision that reads: "I certify that the statements contained in this statement of examination are true to the best of my knowledge and belief." Petition, App. I, p. 31a. We contend that petitioners could rely on this report, as well as the sworn testimony of Dr. Bucknam and Mr. Mueller, to demonstrate the knowledge Dr. Bucknam had regarding Mr. Mueller's condition when Dr. Bucknam permitted Mr. Mueller to drive himself to the hospital for emergency psychiatric treatment of a condition characterized by delusions. *See* Petition, pp. 4-9, 21-27. Nevertheless, respondent claims that we should view these factual admissions as nothing more than "speculation and conjecture." *See* Brief in Response, p. 29.

As petitioners immediately argued in their Motion for Rehearing, the appellate court's actions in determining facts and weighing evidence resulted in an improper taking of factual issues from the jury and deprived petitioners of their constitutional rights to due process and a jury trial under the Michigan Constitution, the Fifth Amendment, the Seventh Amendment, and the Fourteenth Amendment. Motion for Rehearing (to the Michigan Court of Appeals), pp. 6-10. As noted in the Petition, we also presented these arguments to the Michigan Supreme Court. Application for Leave (to the Michigan Supreme Court), pp. 44-49; Motion for Reconsideration

(to the Michigan Supreme Court), pp. 8-10; Petition, pp. 15-16. In summarizing the issues presented by the case and the reasons for granting review, for example, petitioners stated:

- **Under what circumstances is the Court of Appeals free to weigh the unchallenged testimony of a witness and construe the inferences from that testimony against the nonmoving party in a motion for summary disposition?** Plaintiffs submitted the affidavit testimony of a board-certified expert psychiatrist who had reviewed the evidence admitted in the case, including the testimony and party admissions of Dr. Bucknam, and stated that Dr. Bucknam was negligent in letting Mr. Mueller drive under the circumstances. Defendant did not challenge the admissibility of the expert psychiatrist's testimony at trial or on appeal. Nevertheless, the Court of Appeals weighed the expert psychiatrist's testimony, and summarily determining that it was "speculative," refused to construe the inferences of this testimony in favor of the Knights. Is this a violation of Plaintiffs' constitutional right to a jury trial?

- **When is the Court of Appeals empowered to overrule the unchallenged rulings of a trial court without remanding the case for further trial court proceedings?** The trial court found evidence of negligence, which was not controverted by any genuine issue of material fact, and Defendant did not appeal that finding. The Court of Appeals reversed that finding. Similarly, the trial court specifically ruled that this was not a malpractice case, and Defendants did not challenge or

> appeal that ruling. Consequently, Plaintiffs did not need to present evidence proving malpractice in trial court proceedings. The Court of Appeals later reversed the ruling of the trial court without appeal, imposed a malpractice burden of proof, and did not give Plaintiffs an opportunity to return to the trial court to address this burden of proof. Is this a violation of Plaintiffs' rights to Due Process and a jury trial?

Petitioners' Application for Leave to Appeal (to the Michigan Supreme Court), pp. 8-9.

Petitioners then made substantial arguments about these issues, concluding in part: "To uphold this incorrect ruling by the Court of Appeals would clearly violate the Knights' right to a jury trial." Petitioners' Application for Leave to Appeal (to the Michigan Supreme Court), pp. 34-48; 47 (*citing*, Michigan Constitution, Article I, § 14; United States Constitution, Seventh Amendment).

Contrary to respondent's claims, Petitioners have continually presented the lower courts with "a fair opportunity to address the federal question that is sought to be presented here" in accordance with *Adams. Adams v. Robertson*, 520 U.S. 83 (1997), quoting *Webb v. Webb*, 451 U.S. 493 (1981).

CONCLUSION

This case presents important questions testing both the constitutionality of Michigan's statutory physician-patient privilege and the constitutionality of an appellate court's power to render summary judgment by determining facts. Petitioners respectfully request this Honorable Court to grant the writ so that these issues may be reviewed.

Respectfully submitted,

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November, 2001